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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1077

AMES NOWELL,

Petitioner,

v.

IRIS CALDER NOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

AMES NOWELL,

Petitioner,

v.

IRIS CALDER NOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgement of the United States Court of Appeals for the Fifth Circuit entered in the above entitled action on November 7, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 7, 1967, is printed as Appendix A hereto. The judgement of the United States

District Court for the Northern District of Texas, Dallas Division, entered on the 14th day of December, 1966, is printed in the Record at page 21. The order of said District Court overruling Petitioner's motion to quash service of process, entered on the 1st day of November, 1966, is printed in the Record at page 17. No opinion was written by the District Court in overruling the motion or in rendering judgement.

JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on November 7, 1967. This judgement affirmed the decision of the United States District Court at Dallas, Texas, in which the petitioner appeared as defendant and moved that service be quashed on the ground that there had been no compliance with Rule 4(d)(1), Federal Rules of Civil Procedure. The District Court denied this motion. Since no further appearance was made by the defendant below, the plaintiff sought and obtained a default judgment on the 14th day of December, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The questions presented for review are:

(1) Whether delivery of a summons at the apartment of the manager of two unconnected apartment buildings, which buildings are separted by an alley and have different street addresses, constitutes the service of the summons at the usual place of abode of the named defendant under Rule

4(d) (1) of the Federal Rules of Civil Procedure where it appears that the defendant dwelled in an apartment in the other building located on a different street, where the manager had never met the defendant, did not know him and did not deliver the summons to him, he being absent at the time?

(2) Whether notice of the suit on the part of the defendant sometime subsequent to attempted service of process warrants the Court in construing Rule 4(d) (1) in such a manner as to find valid service of process when there has not been compliance with the requirements of the rule?

STATUTE INVOLVED

This petition involves the issue whether the substituted service attempted in this case complies with the requirements of Rule 4(d) (1) of the Federal Rules of Civil Procedure, which provides that:

> Rule 4(d): " * * * Service shall be made as follows:
>
> "(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * * ."

STATEMENT OF THE CASE

The respondent instituted this suit against the petitioner, her former husband, in the United States District Court at Dallas, Texas. The suit sought enforcement of a claim of $18,500.00 placed on two property settlement agreements which the parties had executed. Attempted service upon the petitioner was had by delivering a copy of the summons

and complaint to Mrs. Dorothy Kimbriel, who was the resident manager of the Maricaibo Apartments in Dallas. The Maricaibo was an apartment complex consisting of 63 units in two unconnected buildings, separated by an alley. The buildings had different addresses as they fronted on different streets. Mrs. Kimbriel, who had never met the petitioner at the time of service, resided in one of the buildings and the petitioner resided alone in the other. The only contract between the resident manager and the petitioner prior to the attempted service was that the former received the latter's rent by mail.

After Mrs. Kimbriel received the summons, she forwarded it by mail to an address in New York. Subsequently, the petitioner appeared in the District Court by his attorney and moved that the purported service be quashed on the ground that there had been no compliance with Rule 4(d) (1). This motion was denied. As the petitioner made no further appearance, the respondent sought and obtained a default judgment.

The decision of the District Court was duly appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals in its opinion entered on November 7, 1967, affirmed the judgment of the District Court. The petitioner timely filed this petition in the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court.

ASSERTION OF THE QUESTIONS PRESENTED IN THE COURTS BELOW.

The respondent filed her action in the District Court at Dallas on February 17, 1966, being Cause No. CA-3-1394. Service was then attempted upon petitioner by delivering a copy of the summons and complaint to Mrs. Dorothy Kimbriel, as hereinabove set out. The petitioner then appeared and timely filed his motion to quash service of summons. This motion was denied. As the petitioner made no further appearance, respondent sought and obtained a default judgment from the District Court. The petitioner timely filed his appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has destroyed the requirements of Rule 4(d)(1) where the defendant has actual notice of suit.

2. Rule 4(d)(1) requiring proper service is fundamental and adequate guidelines should be laid down by the Supreme Court.

3. Petitioner has been unjustly subjected to a judgment without being served as provided by the Rule.

The Court of Appeals, in essence, has stated the following proposition of law in its opinion: Where defendant has actual notice of the suit, Rule 4(d)(1) may be so liberally construed as to hold the service valid even though the necessary requirements for service stated in the Rule have not

been followed. This proposition is not and cannot be an accurate statement of the law. A defendant, if he had actual notice, would properly be before the court notwithstanding any type or form of attempted service of process. Actual notice would be controlling over valid service required by the Rule. The petitioner submits that the correct statement of the law concerning the construction of Rule 4(d) is: that where there is actual notice of the suit by defendant, the Federal Rules for service should be liberally construed, but "a substantial compliance with the Rules providing manner of service of summons is required and the courts are without authority to nullify the plain requirements of the rule." (See *Zuckerman v. McCully*, D.C. 7 F.R.D. 739)

In many cases the courts have held that, although the defendant has actual notice of the suit, there must be substantial compliance with the Rules.

In *Blane v. Young*, 10 F.R.D. 109, N.D. Ohio, 1950, service was made on defendant's father before a default judgment was entered. The defendant, who had actual notice, moved to quash service. The Court held that:

> "Rule 4(d)(1) should be liberally construed to effectuate service when actual notice of the suit has been received by defendant. If this ruling is followed literally, defendant has been properly served because he had actual notice of this action. However, the ruling cannot be divorced from the facts. . . . The undisputed evidence in this case . . . shows that the summons was not left at defendant's usual place of abode. Therefore, service was not made according to Rule 4(d)(1)."

The case of *Frasca v. Eubanks,* E.D. Penn. (1959) 24 F.R.D. 268 holds the fact of actual notice is *not* enough. There must be compliance with the plain directions of the rule; the terms "dwelling house" and "usual place of abode" cannot be given an artificial meaning.

The court in *Berner v. Farny,* D.N.J. (1951), 11 F.R.D. 506 wrote:

> "The statute prescribed the manner in which jurisdiction of the court over the person of a defendant may be obtained and the mere showing that he has had notice of the institution of the suit does not fulfill the requirements of the statute. Indeed, whenever a defendant comes into court to challenge the service of process he, of necessity, has received notice, *but clearly, mere notice is not a sufficient ground upon which a court can sustain the validity of service of process* * * *" *(emphasis ours)*

See also *M. Di Leo v. Shin Shu,* S.D. N.Y. (1961) 30 F.R.D. 56 at p. 58.

From the above cited cases it is evident that even though a defendant has actual notice of a suit and the Rules may be liberally construed, the rules still must be followed. The Fifth Court of Appeals has held otherwise. Therefore, for service to be upheld in this cause, the defendant must have been properly served by serving a proper individual at the former's "dwelling house" or "usual place of abode" as provided by Rule 4(d) (1). It is undisputed that this was not done.

Nowhere in the opinion of the Court of Appeals does the Court specifically state that service in this case was proper.

The Court simply states that the Rule must be "liberally construed."

The case of *Judson v. Judson*, D.C. (1943) 8 F.R.D. 336 held that where service was had on the resident manager of the apartment hotel, wherein the parties resided, there was not proper service under R. 4(d). The Court said that service upon a complete stranger who happened to live in the same building was not enough.

The Court of Appeals in its opinion stated that the case of *Di Leo v. Shin Shu*, S.D. N.Y. (1961) 30 F.R.D. 56 "is not controlling, as service in that case was left with another tenant rather than the landlord as in this appeal," and that a tenant would "more likely" receive notice from the landlord rather than another tenant. The Court fails to point out that the other tenant which was served was the daughter of the person being sued. The term "landlord" connotes a rooming house situation as stated in *Smith v. Kincaid*, 6 Cir. 1957, 249 F. 2d 243, in which the landlord appeared to live under the same roof and in the same group of rooms as the defendant (See annotation 14 L. Ed. 2d 733, at Page 752). In the case at bar, an apartment manager, not a "landlady," was served, and she did not live in the same building as petitioner or even on the same street. This is not and cannot be called service at his "dwelling house" or "usual place of abode."

The Court of Appeals also cites the cases of *Karlsson v. Rabinowitz*, 4 Cir. 1963, 318 F. 2d 666 and *Skidmore v. Green*, S.D. N.Y. 1940, 33 F. Supp. 529 in which adequate service was found by the Court. These cases are not con-

trolling. They present completely different fact situations, viz., service of process was made upon relatives of the defendants at the defendants' homes which were clearly "dwelling houses" and/or "usual places of abode." Attempted service here was *NOT* at the apartment (dwelling place) of defendant. In *Pickford v. Kravetz*, S.D. N.Y. (1952), 17 Fed. Rules Serv. 4d 121, case 1, substituted service was upheld where the manager of the hotel was served in which the defendant was temporarily residing. The hotel manager was a friend of the defendant, had control over the premises at the same address, and wrongfully connived with the defendants to avoid service. (See 2 Moore Federal Practice, Sec. 4.12; p. 1047). In the case at bar, the apartment manager had not ever met the defendant, and had no control or knowledge of his use of his apartment.

The petitioner submits that his "dwelling place" or "usual place of abode" does not extend to another building located upon another street, nor to an apartment manager who is *not* a landlady living within the same building or cluster of rooms i.e., living at defendant's "dwelling place."

The Court of Appeals points out that relief might be available to petitioner under Rule 60(b) of Federal Rules of Civil Procedure. "A defendant can obtain relief under 60(b) when a default judgment is entered 'after service of process' * * * sufficient to confer jurisdiction but of which the defendant had no actual notice without fault on his part * * *", 3 Barron and Holtzoff, Federal Practice and Procedure, Sec. 1325, p. 404. Under this Rule a completely different situation exists than in the case at bar. The rule

assumes proper service, usually constructive or substituted, of which a defendant never received the notice. Thus, before Rule 60(b) may be invoked, there must be valid service under the Rules of Civil Procedure. See *Williams v. Capital Transit Co.*, D.C. (1954) 215 F. 2d 487, *Huntington Cab Co. v. American Fidelity and Cas. Co.*, D.C. W.Va. 1945, 4 F.R.D. 496; *Ellington v. Milne*, D.C. N.C. (1953), 14 F.R.D. 241. Service of process not completed at the defendant's usual place of abode is ineffective. *Williams v. Capital Transit Co. supra.* Therefore, even under cases construing Rule 60(b), if the service was not properly made under Rule 4(d)(1), then the service is void and 60(b) does not cure the invalid service.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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In The

United States Court of Appeals

For the Fifth Circuit

AMES NOWELL,

Appellant,

Versus

IRIS CALDER NOWELL,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(November 7, 1967).

Before RIVES, GOLDBERG and AINSWORTH, Circuit Judges.

RIVES, Circuit Judge: The question presented on this appeal is whether the substituted service effected in this case complies with the requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure.[1]

The appellee instituted this suit against the appellant, her former husband, in the United States District Court at Dallas. The suit sought enforcement of a claim of $18,500

[1] Rule 4(d): "* * * Service shall be made as follows:

"(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *."

based on two property settlement agreements which the parties had executed. Service upon the appellant was had by delivering a copy of the summons and complaint to Mrs. Dorothy Kimbriel who was the resident manager of the Maricaibo Apartments in Dallas. The Maricaibo was an apartment complex consisting of 63 units in two buildings separated by an alley. The buildings had different addresses as they fronted on different streets. Mrs. Kimbriel, who had never met the appellant at the time of service, resided in one of these buildings and the appellant resided alone in the other. The only contact between the resident manager and the appellant prior to service was that the former received the latter's rent. Shortly after Mrs. Kimbriel received the process, the appellant appeared in the district court by his attorney and moved that service be quashed on the theory that there had been no compliance with Rule 4(d) (1). This motion was denied. As the appellant made no further appearance, the appellee sought and obtained a default judgment.

It is settled that jurisdiction can be acquired over a defendant by leaving process with the landlady of the rooming house wherein the defendant resides. *Smith v. Kincaid*, 6 Cir. 1957, 249 F.2d 243. In a somewhat similar case, a New York district court held that service was adequate where process was left with the manager of a hotel where the defendant was temporarily staying. The court observed that the manager of the hotel was a resident of the defendant's

dwelling place, the hotel, within the requirements of Rule 4(d)(1), although the manager made his home elsewhere. *Pickford v. Kravetz*, S.D. N.Y. 1952, 17 Fed. Rules Serv. 4d.121,[2] Case 1. From reading the appellant's brief, the issue on appeal that implicitly arises may be stated as follows:

Whether the language in 4(d)(1) must be so narrowly construed that the adequacy of service turns upon whether the apartment manager resides in the same or a different building as the defendant.[3]

The appropriate construction of Rule 4(d)(1) varies according to whether the defendant received notice of the suit. 4(d)(1) should be broadly construed where the defendant, as in this case, received notice of the suit. This rule of construction is, of course, subject to the limitation that the construction of the statute's language must be a natural rather than an artificial one. *Frasca v. Eubank*, D.C. Pa. 1959, 24 F.R.D. 268. Otherwise, no hard and fast rule can be fashioned to determine what is or is not a party's "dwelling house or usual place of abode" within the rule's meaning; rather the practicalities of the particular fact

[2] Professor Moore points out that *Pickford, supra*, as authority for the validity of service in such a situation might be limited by the fact that the court felt that the manager and the defendant conspired to avoid service. 2 Moore Federal Practice, ¶ 4.12 (p. 1047).

[3] We, of course, can only speculate that the appellant would have agreed that substituted service upon a landlord occupying the same building would have been valid. But regardless, we hold that service under that situation is undoubtedly good, and now we must determine whether the fact that the resident manager and the defendant resided in separate buildings requires a different result.

situation determine whether service meets the requirements of 4(d) (1).

> "* * * the provision concerning usual place of abode should be liberally construed to effectuate service if actual notice has been received by the defendant and that in the last analysis the question of service must be resolved by 'what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint.[55]

---

[55]* * * Rovinski v. Rowe, C.C.A. 6th 1942, 133 F.2d 687 [689] * * *."

1 Barron & Holtzoff, Federal Practice & Proceure §177, p. 666.

A brief analysis of several cases which have construed 4(d) (1) follows so that the facts of this appeal may be considered in context. In *Karlsson v. Rabinowitz*, 4 Cir. 1963, 318 F. 2d 666, process had been left with the defendant's wife at his house in Maryland where the defendant himself had lived prior to his having moved ahead of the family to Arizona. The court held that the service met the requirements of Rule 4(d) (1), although twenty days before service the defendant had left Maryland with the intention of permanently giving up his residence, never to return. The court expressly approved the liberal construction rule applicable when the defendant receives actual notice of the suit. "Additionally, the court emphasized that each case "proceeds on its own facts." *Karlsson, supra*, at 668. The

case of *Di Leo v. Shin Shu*, S.D. N.Y. 1961, 30 F.R.D. 56, is not controlling, as service in that case was left with another tenant rather than the landlord as in this appeal. The significance of this difference is that the substantial nexus that exists between tenant and landlord does not exist between tenants themselves. The landlord, unlike his tenants, has a degree of control over all tenants and the premises that each occupies. Also a tenant generally would be more likely to receive notice of a suit where process had been left with his landlord rather than another tenant. This too is a consideration in determining the validity of service under Rule 4(d)(1). 1 Barron & Holtzoff, Federal Practice & Procedure §177, p. 666. In *Skidmore v. Green*, S.D. N.Y. 1940, 33 F. Supp. 529, the defendant attacked the service which had been left at his brother's home in New York. The defendant had retired in 1937 and from that time until the car accident in Florida, in October 1939, which produced the suit, the defendant had lived most of the time in a house trailer traveling around the country. The court in upholding the service stated that the process "left at the home of the defendant's brother was left at the defendant's 'usual place of abode.'" *Skidmore, supra*, at 529. There is little if any evidence in the reported case, however, that from 1937 on the defendant actually resided with his brother and his wife in New York. The court apparently felt that it was crucial to its decision that in each year beginning with the 1937 purchase of the trailer, the defendant had put New York license plates on his car; and that he had used his brother's address in the license applications. The second

finding would appear to be the only one of signifiance and is easily explained in light of the defendant's migratory life. Nevertheless, that court held that the requirements of 4(d)(1) were met.

The above decisions, the relief available to a defendant under Rule 60(b) of the Federal Rules of Civil Procedure,[4] and the remedial purpose of Rule 4(d)(1) convince this Court that a liberal construction of the rule is required where the defendant had notice of the suit. The judgment is

AFFIRMED.

---

[4] A defendant can obtain relief under 60(b) when a default judgment is entered "after service of process * * * sufficient to confer jurisdiction but of which the defendant had no actual notice without fault on his part * * *." 3 Barron & Holtzoff, Federal Practice & Procedure §1325, p. 404.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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v.

IRIS CALDER NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AMES NOWELL,

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IRIS CALDER NOWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 384 F. 2d 951. There was no opinion by the United States District Court for the Northern District of Texas, Dallas Division.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented for review, as stated by the Court of Appeals, 384 F. 2d 951, 953 (see Petition, at p. A-3) is as follows:

> "Whether the language in (Rule) 4(d)(1) must be so narrowly construed that the adequacy of service turns upon whether the apartment manager (upon whom substituted service was made) resides in the same or a different building as the defendant."

STATUTE INVOLVED

The pertinent provision of the Federal Rules of Civil Procedure involved is set forth in the Petition at page 3.

STATEMENT OF THE CASE

On February 17, 1966, Respondent, the former wife of Petitioner, filed suit in the United States District Court for the Northern District of Texas, Dallas Division, to enforce the provisions of a separation agreement executed by the parties on December 11, 1956, and a post-divorce supplemental agreement dated March 22, 1957. The United States Marshal, having been unable to make personal service on Petitioner during a period of approximately four months, served him on June 15, 1966, as reflected in the return, by

delivering a copy of the summons and of the complaint to "Mrs. Dorothy Kimbriell, in person, Manager of the Maricabo (sic) Apts. his landlady, at the Apt. Bldg. where his place of abode is * * *" The record reveals that Petitioner lived alone at apartment 208 of the Maracaibo Apartments, an apartment complex consisting of sixty-three units in two buildings which are separated by an alley. Mrs. Dorothy Kimbriell was the resident manager of the Maracaibo Apartments on the date of service, although the apartment in which she resided was not located in the same building as Petitioner's apartment. Within the time prescribed by the Federal Rules of Civil Procedure, Petitioner appeared in the district court by his attorneys and filed a motion to quash service.

Petitioner's motion to quash was heard on September 16, 1966, and was overruled on November 1, 1966. The trial judge ordered Petitioner to serve his answer within ten days. Petitioner having failed to serve his answer within such time, the clerk entered his default pursuant to Rule 55(a) and promptly notified him that entry of default had been made. Application then was made by Respondent to the court for entry of judgment, and judgment was entered on December 14, 1966. Petitioner did not appear at the hearing on Respondent's motion for judgment, although notice of such hearing was duly served on his attorneys.

The decision of the district court was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, and Petitioner now seeks a writ of certiorari.

Two statements contained in Petitioner's Statement of the Case are incorrect and must be challenged. Petitioner states at page 4, that:

> "The only *contract* between the resident manager and the Petitioner prior to the attempted service was that the former received the latter's rent by mail." (Emphasis added)

This is an apparent typographical error, and "contract" should read "contact".

Petitioner also states, at page 4:

> "After Mrs. Kimbriell received the summons, she forwarded it by mail to an address in New York."

There is nothing in the record to support this statement. All that appears in the record is that Mrs. Kimbriell received the summons and that subsequently Petitioner appeared in the district court by his attorneys and moved that service be quashed.

ARGUMENT

The issue in this case is uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. As stated by the Court of Appeals in its opinion, the only question which it decided was whether Rule 4(d)(1) *must* be so narrowly construed that adequacy of service under such rule turns upon whether the apartment manager resides in the same building as the defendant or in a different one. All that the Court of Appeals holds is that the rule need not be thus narrowly construed—i.e., that there are circumstances under which serv-

ice upon a landlady or resident apartment house manager may satisfy the requirements of Rule 4(d)(1), even though she does not reside in the same building or apartment unit as the defendant. The court then found that the facts of this case met the requirements of Rule 4(d)(1) and overruled the motion to quash service.

I

The Decision Below is Clearly Correct

The Court of Appeals simply applied the well-established principle that Rule 4(d)(1) should be broadly construed to uphold service where the defendant actually has received notice of the suit, subject to the limitation that the construction of the rule must be a natural rather than an artificial one. *Rovinski v. Rowe,* 131 F. 2d 687 (C.A. 6, 1942); *Frasca v. Eubank,* 24 F.R.D. 268 (D.C.Pa., 1959); 1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 177, p. 666. The present case involves nothing more than the application of this rule of liberal construction to a particular set of facts; and it is submitted that the construction given to Rule 4(d)(1) by the Court of Appeals clearly was a natural rather than an artificial one, since both Petitioner and the manager resided in the Maracaibo Apartments.

II

There Is No Conflict of Decision

There is no decision in conflict with the rule announced in this case. In fact, the cases cited by Petitioner recognize

that Rule 4(d)(1) should be liberally construed to uphold service where notice of suit has been received by the defendant. It appears that Petitioner also accepts this as a correct statement of the law, although he quarrels with the result reached in this case.

III

There Is No Important Question of Federal Law

As hereinabove noted, this case involves nothing more than the application of a well accepted and generally recognized rule of construction to a particular fact situation. It does not involve any important question of federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 14th day of February, 1968, I served the foregoing Brief for Respondent in Opposition on Petitioner by depositing two (2) copies thereof in the United States mail, with proper postage affixed, addressed to Lawrence W. Anderson of Anderson, Henley, Shields, Bradford and Pritchard, 3100 Fidelity Union Tower, Dallas, Texas, 75201, one of Petitioner's attorneys of record.

W. B. West, III

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: December 21, 1967

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No._____

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OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on October 27, 1967, after remand of this case by this Court to the trial court.

OPINIONS BELOW AND PRIOR OPINIONS OF THE COURT

This Court's prior decision, *National Dairy Products Corporation* v. *United States,* vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding the case to the district court for further consideration in light of *Dennis* v. *United States,* 384 U.S. 855 (1966), is reported at 384 U.S. 883 (1966) and is reproduced beginning at page A-81 of the Appendix hereto.* The opinion of the district court denying petitioner's post-remand motion for a new trial in the light of *Dennis* is reported at

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* Appendix references are hereafter cited "App. A- ...".

262 F. Supp. 447 (W.D. Mo. Jan. 10, 1967) (App. A-15). The opinion of the Court of Appeals, affirming in part and reversing in part this judgment of the district court, is unofficially reported in 5 Trade Reg. Rep. (1967 Trade Cas.) ¶ 72,254 (App. A-1). This Court's prior opinion, *United States* v. *National Dairy Products Corporation*, upholding the constitutionality of Section 3 of the Robinson-Patman Act, is reported at 372 U.S. 29 (1963) (App. A-144).[1]

JURISDICTION

The judgment of the Court of Appeals was dated and entered October 27, 1967 (App. A-13). A timely petition for rehearing, filed November 16, 1967, was denied on November 21, 1967 (App. A-14). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is contrary to the principles enunciated in *Dennis* and followed in *United States* v. *Youngblood*, 379 F.2d 365 (2d Cir. June 21, 1967); *Cargill* v. *United States*, 381 F.2d 849 (10th Cir. Sept. 6, 1967); and *Worthy* v. *United States*, 383 F.2d 524 (D.C. Cir. Aug. 11, 1967), for a Court of Appeals to hold that it is not reversible error for a trial court to deny to a defendant inspection of grand jury transcripts used by the government to refresh the recollections of important witnesses on the ground that there is other evidence to support the conviction and the

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1. Prior opinions of the Court of Appeals and of the district court are National Dairy Products Corporation v. United States, 350 F.2d 321 (8th Cir. 1965) (App. A-83) and United States v. National Dairy Products Corporation, 231 F.Supp. 663 (W.D. Mo. 1964) (App. A-119).

refreshment procedure does not adduce substantial evidence helpful to the government.

2. Whether, in a multi-count indictment, the reversible error found as to some counts by the Court of Appeals in the denial to a defendant of inspection of portions of grand jury testimony used by the government to refresh the recollections of important witnesses on questions of intent is reversible error as to all counts, where the same basic intent charge was a key issue in all counts.

3. Whether petitioner was denied its constitutional rights to a fair trial and to confront the witnesses against it when, following government counsel's reading of portions of their grand jury testimony for purposes of refreshment, important witnesses adopted portions of the testimony so read, although not refreshed, and the trial court denied to defense counsel inspection of the portions read and other portions relating to the same subject matter.

4. Whether courts below, following remand of this action for further consideration in light of *Dennis,* misconstrued and misapplied the mandate of this Court and also disregarded the rule of *O'Connor* v. *Ohio,* 385 U.S. 92 (1966), in holding that petitioner waived its right to inspect grand jury transcripts not used by the government at trial for purposes of refreshment of important government witnesses, disclosure of which petitioner had not requested in reliance upon pre-*Dennis* decisions of this Court and of the Court of Appeals for the Circuit in which the case was tried.

5. Whether the trial court in instructions relating to petitioner's claimed criminal violations of Section 3 of the Robinson-Patman Act, in allegedly selling milk at unreasonably low prices for the purpose of destroying competition, misapplied the prior decision of this Court (*United States*

v. *National Dairy Products Corporation*, 372 U.S. 29 (1963) (App. A-144)), in that such instructions, over defense objections, (a) failed to charge that "specific" intent to destroy competition is a necessary element of the alleged offense and may not be presumed, and (b) placed upon petitioner the burden of justifying its challenged prices on the basis of an erroneously stated "good faith meeting competition defense" drawn from Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, applicable in civil price discrimination cases.

STATUTES AND RULES INVOLVED

Pertinent portions of the Fifth and Sixth Amendments to the Constitution; Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958); Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. 13a (1958); Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a) and 13(b) (1958), and Rule 6(e) of the Federal Rules of Criminal Procedure (18 U.S.C.), involved herein, are set forth in the Appendix (App. A-153).

STATEMENT

Through its Sealtest Foods Division ("Sealtest"), petitioner engages, among other things, in the processing and distribution of fluid milk. From Sealtest's Kansas City, Missouri, milk processing plant, petitioner distributes milk primarily in paper containers on company-owned routes in the greater Kansas City area and through independent distributors in rural areas in western Missouri and eastern Kansas in competition with numerous other dairy companies, large and small, selling milk in paper and glass containers, including glass gallon jugs.

On September 16, 1959, an indictment containing fifteen counts was returned by a grand jury in Kansas City, Missouri.[2] Eight counts charged that petitioner engaged in conspiracies to fix prices and eliminate competition in the sale of milk in portions of the above-described area in violation of Section 1 of the Sherman Act, and seven counts charged the substantive offense of selling milk below cost for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act.[3] Trial began before a jury on June 13, 1963, and on August 16, 1963, after nearly three days of deliberation, the jury returned verdicts of guilty on the first thirteen counts and not guilty on the last two counts.

Petitioner appealed to the Eighth Circuit Court of Appeals, urging among other grounds for reversal (1) that the trial court erred in denying petitioner's motions for the production of portions of the grand jury transcripts which the government had used for refreshment of seven important witnesses[4] (and other related portions thereof),

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2. Petitioner was a defendant in all counts; Raymond J. Wise, petitioner's Vice President in charge of its Sealtest Division's Central Division, was a defendant only in Counts 11-13. Various other dairy concerns and individuals were named in the indictment and in the government's bills of particulars as alleged co-conspirators, but not as defendants.

3. One Sherman Act charge (Count 11) was not accompanied by a corresponding Robinson-Patman Act charge. Counts 11 and 12 under the Sherman Act and Count 13 under the Robinson-Patman Act dealt with the greater Kansas City area; the remaining counts (in pairs of one Sherman Act and one Robinson-Patman Act count) dealt with petitioner's sales to its independent distributors in six separate non-metropolitan areas.

4. These "refreshment witnesses" are identified, and pertinent portions of their testimony, together with petitioner's motions for disclosure and the court's rulings thereon, are set forth at App. A-156—A-279.

and (2) that the trial court's instructions on the Robinson-Patman Act charges embraced an erroneous interpretation of Section 3 of the Robinson-Patman Act and of this Court's decision in a prior government appeal.[5] On August 27, 1965, the Court of Appeals affirmed the judgments of the District Court (App. A-117).

Thereafter, petitioner filed a petition for a writ of certiorari in this Court. This petition was granted, the judgment of the Court of Appeals was vacated and the cause was remanded for further consideration in light of *Dennis* v. *United States*, 384 U.S. 855 (1966) (App. A-81).

Upon remand, the trial court accepted briefs and heard oral argument on the application of *Dennis* to this case. During the course of these proceedings, petitioner filed a motion for a new trial (App. A-71) in which it realleged as a basis therefor the trial court's denial of petitioner's motions to inspect portions of the grand jury testimony used by the government to refresh the recollections of the seven important trial witnesses mentioned above. It also urged that under *Dennis* petitioner should have a new trial at which it would be entitled to inspect the grand jury testimony of thirty important government witnesses, whose grand jury transcripts were not used for refreshment at the trial, but were, in many cases, used by the government to prepare the witnesses prior to trial.[6] The trial court found no error in his rulings at trial, denied petitioner's motion, and re-entered the judgments on Counts 1-13 (App. A-65, A-70).

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5. United States v. National Dairy Products Corporation, 372 U.S. 29 (1963) (App. A-144).

6. These witnesses whose grand jury transcripts were not used by the government at trial are the "non-refreshment witnesses." A description of them is set forth in petitioner's post-remand motion for a new trial (App. A-73—A-80).

On appeal from this post-remand judgment, the Court of Appeals for the Eighth Circuit agreed with petitioner that the trial court's refusal to order the production of the requested portions of the grand jury transcript used for refreshment was error, but it reversed the trial court only as to Counts 11-13 (Kansas City counts), sustaining the trial court as to Counts 1-10 (distributor counts) on the ground that other evidence supported the verdicts on the latter counts and that the refreshment process had elicited no evidence which was demonstrably prejudicial to the defense on those counts (App. A-13).

The Government's Use of the Grand Jury Transcripts

All counts of the indictment contained the same fundamental charge that petitioner's pricing policy was a predatory one which was intended to coerce competitors and eliminate gallon jug competition.[7] The government's proof at trial consisted largely of testimony of dairy executives and distributors (including personnel of petitioner and

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7. Arguing in support of consideration of intent evidence without regard to the count in which it was offered, the government urged: "The necessary prerequisite [for joinder] is that the offense be of the same or similar character, or be part of the . . . same plan. The indictment and the evidence in the instant case indicate that the crimes joined are of similar character, and that the bulk of them are a part of National's plan to eliminate or curtail the gallon jug competition by sharply narrowing or eliminating the 'spread.'" It further emphasized that "all of the evidence heretofore introduced during its Presentation relating to the Kansas City counts is by no means intended to be limited to the Kansas City counts. . . ." See Government's Memorandum Concerning the Relationship Between Different Counts in the Indictment and Evidence Relating Thereto, appearing in volume VIII of the Pleadings at pages 1244 and 1246. (Pleadings references are hereafter cited "... Pl. ...".).

alleged co-conspirator concerns), as well as complaining dairy operators, many of whom testified as to declarations by petitioner's personnel having a direct bearing on the intent issue. In order to refresh the recollections of certain of these witnesses on "critical, incriminating facts,"[8] the prosecution on twenty-four occasions used the grand jury transcript upon its direct examination of five important government witnesses (Augenstein, Flanagan, Crimmins, Gilmore and Gardner — see App. A-158—A-261) and during its cross-examination of two important defense witnesses (Baird and Stewart—App. A-261—A-279). Petitioner moved to inspect portions of the grand jury transcripts so used and other portions related thereto, but its motions in all cases were denied.

Among the refreshment witnesses, Stewart, petitioner's general manager, Flanagan, its sales manager, and Baird, its milk sales manager, were the responsible employees of petitioner in all the indictment areas. Baird and Stewart were defense witnesses as to all counts; Flanagan was called by the government and was questioned at length, primarily as to Counts 11-13. All three were alleged co-conspirators in each of the distributor areas as well as in Kansas City. They played leading parts in the events at issue in all counts, and this was reflected both in their own testimony[9] and in the testimony given by many other wit-

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8. Brief for Appellee United States, p. 80, National Dairy Products Corporation v. United States, 350 F.2d 321 (8th Cir. 1965).

9. Baird, for example, gave the recent history of Sealtest's distributor business, described the competitive nature of the milk business in the distributor areas, and explained Sealtest's arrangement of selling to distributors first at a "dock price" and later of selling at a specific margin below the going wholesale (*i.e.*, into-store) prices in their respective markets (R. 5082-84, 5105-22), Sealtest's selling policies (R. 5128-30), and the limited

nesses[10] concerning their activities and statements. In final argument, government counsel again and again made references to the parts played by these three witnesses in matters at issue in Counts 1-10 (R. 6852, 6857, 6867, 6875-77, 6883, 6895-96, 6899-6900).

In addition, all the refreshment witnesses testified as to matters which bore upon a key issue common to all the counts — petitioner's basic motive or intent in its pricing. The government, to show petitioner's basic intent was predatory in all counts, sought to establish (1) that petitioner devised and conspiratorially put into effect plans to reduce prices to destroy competition and, after that had been accomplished, to raise prices;[11] (2) that petitioner's alleged "phi-

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authority of the distributor sales supervisors (R. 5130-32). He described the competitive situation in the Kansas City area, and reviewed in specific detail Sealtest's reasons for its various price changes in 1957-1958 (R. 5177-5301, 5335-78). He also testified specifically as to Sealtest's pricing in Mexico-Centralia (Counts 7 and 8), and in Sedalia (Counts 3 and 4) (R. 5140-41, 5174-75).

10. For example, numerous prosecution witnesses from the "distributor areas" testified concerning Flanagan and his activities: under Counts 1 and 2, Sealtest distributor Martin (R. 3329-32, 3338, 3368-71), and competitors Theno (R. 3407-08) and Casper (R. 3581); under Counts 3 and 4, distributor Newton (R. 3870-75, 3889-93, 3902, 3904), and competitors Greer (R. 3930-42, 3945) and Freese (R. 3985-87); under Counts 5 and 6, distributor Heyer (R. 4057-60, 4070); under Counts 7 and 8, distributor Isaacs (R. 2920-21), and competitors Anthony Weber (R. 3029) and Dan Weber (R. 2973-74). See also the government's bills of particulars, III Pl. 422, 424, 428.

11. Such an alleged scheme, specifically charged as being the substance of the offense in Count 12, was called the "Wise plan" by government counsel. The reduced prices in the Kansas City area in the summer of 1958, allegedly resulting from the scheme's first step, formed the basis for the charge in Count 13, and was one of the basic issues in Counts 1 and 2 involving pricing in the same period in the Paola, Kansas, area (see App. A-172 n). Count 11

losophy" in competing with the gallon jugs was to meet the gallon jug price of petitioner's competitors with two half-gallons in paper cartons at the same price, and that this "philosophy" was predatory and not legitimately competitive because paper cartons resulted in greater cost to petitioner and had greater consumer appeal;[12] and (3) that the gallon jug operators were not in fact regarded by petitioner as a significant factor in the market and, therefore, that petitioner's claim that its pricing was defensive to protect its volume was spurious.[13]

Government counsel utilized portions of their grand jury testimony in an effort to refresh the recollections of Flanagan, Augenstein, Gardner, Crimmins, Gilmore and Stewart on aspects of intent item (1), above; Flanagan and Augenstein on intent item (2); and Baird on intent item (3) (see notes 11-13, *supra*).

Concededly, the government achieved three instances of actual refreshment, and six more instances where the witnesses, although not refreshed, adopted their grand jury jury testimony, or a total of nine instances of successful use of the grand jury transcript by the government before the trial jury.[14]

The Trial Court's Instructions on Intent

Although the five government refreshment witnesses testified primarily with respect to events at issue in Counts

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involved similar conspiracy charges in connection with a milk price war in the fall of 1957. See also App. A-183—A-187, A-191—A-192, A-197—A-199, A-213—A-214, A-243—A-244, A-255—A-256.

12. See App. A-177—A-179, A-223—A-224.

13. See App. A-172—A-179, A-262—A-265.

14. Brief for Appellee United States, p. 36, National Dairy Products Corporation v. United States, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,254 (8th Cir. Oct. 27, 1967).

11-13 and Counts 1 and 2 (the two defense witnesses refreshed by the government testified with respect to all counts), the trial court's instructions to the jury had the effect of coalescing all counts by making a witness' testimony directly applicable to the intent issue in the other counts.[15] Charging the jury that, in general, it must consider evidence only under the particular count as to which it was received, the trial court explained that there was an exception to this rule which permitted the jury to consider "evidence of any earlier occurrences received in . . . one particular count that might help explain the intent of a defendant in another count . . ." (R. 7112, App. A-281—A-282). Explaining that this exception was broad enough to permit consideration of a general course of conduct "even before the period of indictment," the trial court gave the illustration that in considering any conspiracy count, the jury could "consider also evidence of earlier occurrences pertaining to another . . . [conspiracy] count which [the jury] might find would bear also upon . . . [petitioner's] intent in the count under consideration" (R. 7113, App. A-282).

The Non-Refreshment Witnesses

Petitioner's post-remand motion for a new trial (App. A-71), denied by the trial court (App. A-65), urged as an additional ground for the new trial that under *Dennis* and by virtue of the Court's specific remand of the case for consideration in light of *Dennis,* petitioner was entitled to a new trial at which it would be permitted to inspect the grand jury testimony of thirty important government witnesses who testified before the grand jury, but whose

15. The full text of the trial court's instructions on this issue is set forth in the Appendix (App. A-280—A-283).

transcripts the government did not use for refreshment at trial.

The motion set forth in detail the factors which brought the disclosure of the testimony of these thirty witnesses within the *Dennis* rule.[16] The trial court denied the motion without opinion and the Court of Appeals affirmed on the ground that the motion was not timely, despite this Court's remand order (App. A-11—A-12).

The Robinson-Patman Act Instructions

In the government's prior appeal in this case, this Court sustained the constitutionality of Section 3 of the Robinson-Patman Act against petitioner's charge of unconstitutional vagueness, holding that, at least as to conduct specifically challenged in the indictment, the statute gave adequate warning (*United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32-33 (1963) (App. A-147—A-148)). In the course of its opinion, the Court took considerable care to detail the substantial proof which the government would have to adduce to win a conviction, prescribing the elements of this burden in terms of the construction of the statute which the Court had adopted to preserve the statute's constitutionality.

Under this construction, the Court would require the prosecution to prove "sales made below cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37, App. A-151—A-

16. App. A-72—A-79. Twenty of the thirty non-refreshment witnesses testified solely concerning Counts 1-10. Thirteen of the thirty were principals in or employees of competing companies which have filed treble damage suits against petitioner; four others were, according to the government's bills of particulars and their trial testimony, injured by the alleged acts of petitioner.

152).[17] But, despite this clear statement, the trial court instructed the jury that "the law presumes that persons must be held to have intended the necessary and direct consequences of their acts" (App. A-296 n.), and that they are chargeable for consequences reasonably to be anticipated (App. A-296); he declined to charge, as requested by petitioner, that "the statute requires something more than merely intending normal consequences of an act . . . [that what is required is] proof of specific intent to destroy competition."[18]

The trial judge also instructed the jury that "sales below cost are not condemned if made in furtherance of a need to meet a lawful, equally low price of a competitor" (App. A-288). He declined, however, to instruct, as requested by petitioner, that to be "unreasonably low" under Section 3, prices must be shown to be "below cost and . . . not established . . . for any legitimate business purpose," or that petitioner must be acquitted if its challenged sales were made "in good faith to meet . . . competition" (IX Pl. 1549, 1557). The court disparagingly commented that testimony to the effect that a "company's pricing policy was justified by meeting competition . . . [is] simply a conclusion on the part of the witness" (App. A-288), and a "mechanical word formula" (App. A-289). He instructed that the "defense of meeting competition" protected petitioner (implying that it was petitioner's burden to prove), provided that the jury "found as a fact that . . . [petitioner] offered its reduced prices simply to meet the law-

17. Earlier in its opinion, the Court had emphasized the necessity of the government's proving two "separate, though related, statutory elements"—the objective below cost sale and the subjective specific intent to destroy competition (372 U. S. at 35, App. A-150).

18. See IX Pl. 1546, 1553.

fully low price of a competitor, and [it] . . . found in fact that a lawfully low price of a competitor was in existence . . ." (App. A-290). He further qualified this "defense," instructing the jury to decide if petitioner "in fact undercut" gallon jug prices by pricing its half-gallons "at the same price . . . or so close to the gallon jug as to be considered below what the government contends was an existing differential under normal . . . conditions" (App. A-292—A-293), and he confused the issue by comparing the milk business to the gasoline business where, he asserted, there is a "known differential" (App. A-292).

Petitioner's requested instructions concerning "specific intent" and "meeting competition" (IX Pl. 1546, 1548, 1550-55, 1557, 1559) were refused by the trial court in favor of his "own instruction" in a pre-instruction conference (see R. 6744). Following the charge to the jury, the trial court indicated generally that he wanted only "additional objections" not previously ruled upon (R. 7203). Petitioner thereafter made objections to the instructions given on "specific intent"; "lawful" competitive price "in fact . . . in existence"; the belittling references to "mechanical word formulas"; and the confusing references to the "established differential" in the gasoline business (R. 7204-05, 7225-32, 7235-36, 7238). These objections were overruled (R. 7251-53).

REASONS FOR GRANTING THE WRIT

The decision of the court below is contrary to the principles of *Dennis* v. *United States,* 384 U.S. 855 (1966). It not only fails to comply with this Court's mandate to reconsider this case in light of *Dennis,* but it is in conflict with the decisions of three other circuits as to the proper application of that case.

The holdings below also misapply this Court's prior decision in this case upholding the constitutionality of Section 3 of the Robinson-Patman Act, and thereby raise serious questions as to its administration.

Certiorari should be granted in this case in order that the Court may resolve the conflict concerning the application of *Dennis,* clarify the standards governing Section 3 of the Robinson-Patman Act, and enforce its prior decisions in this case.

I. The Court of Appeals Failed to Apply the Standards of the Dennis Case in Affirming Counts 1-10, Contrary to This Court's Mandate and in Conflict with Decisions in Three Other Circuits

The Court of Appeals decision in this case would engraft a significant exception on the rule of the *Dennis* case. It would legitimatize the non-disclosure to a defendant of the grand jury testimony of important trial witnesses for which a defendant has a "particularized need" if, at the end of the trial, it is found that other evidence supports the verdict and use of the grand jury transcript was not of substantial aid to the government. Such an exception would be impossible to administer during trial and would totally confuse the procedure governing disclosure of grand jury transcripts in federal criminal actions.

In reversing on Counts 11-13, the Court of Appeals followed the rationale of *Dennis* v. *United States,* 384 U.S. 855, 875 (1966), and the decisions in other post-*Dennis* cases[20] that a defendant's particularized need to inspect

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20. United States v. Youngblood, 379 F.2d 365 (2d Cir. June 21, 1967); Cargill v. United States, 381 F.2d 849 (10th Cir. Sept. 6, 1967); Worthy v. United States, 383 F.2d 524 (D.C. Cir. Aug. 11, 1967); Lucignano v. United States, No. 21,559 (E.D. Pa. Sept. 13, 1966).

the grand jury testimony of important witnesses arises from the circumstances (for example, from the fact that the government uses the grand jury transcript for impeachment or refreshment of important witnesses) and that, once particularized need appears, the defense is entitled to a new trial if disclosure is denied.[21] The court recognized that foreclosure of petitioner from a source of evidence was the basic error and that the sufficiency of the evidence to support the conviction on these counts, or the quantum of help, if any, received by the government from the refreshment procedure, was irrelevant (see App. A-4—A-6). However, when it affirmed the conviction of petitioner on Counts 1-10, the court departed from this majority rule and gave these irrelevant considerations decisive weight (see App. A-9—A-11).

It is clear from *Dennis* that a defendant's right to a new trial because of a trial court's erroneous refusal to order disclosure is not in any way affected by the sufficiency of other evidence to support a guilty verdict. This Court limited its review in *Dennis* to three questions, one being the grand jury point; it declined to consider the *Dennis* petitioner's contention that there was insufficient evidence to convict. And despite the holding by the lower court in that case that there was sufficient evidence to sustain the conviction,[22] this Court reversed on the grand jury point. Nor is there anything in *Dennis* to establish as a prerequisite to reversal a showing that the government was able through use of the grand jury transcript to adduce damaging evidence, Indeed, *Dennis* is to the contrary, for there a new trial was ordered even though the government had made no

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21. See App. A-6—A-8, where the Court of Appeals discusses the post-*Dennis* cases.

22. Dennis v. United States, 346 F.2d 10 (10th Cir. 1965).

affirmative use of the transcript and adduced no evidence of any nature by virtue of the transcript. Thus, both the sufficiency of other evidence and the value to the government of the refreshment procedure was irrelevant and should have been ignored by the Court of Appeals when it affirmed Counts 1-10, as it ignored those factors in reversing Counts 11-13.

As this Court held in *Dennis,* the controlling consideration in a situation such as this is whether or not there is the possibility that *disclosure* might lead to evidence *useful to the defense,* and this determination, it was held, can be made only by defense counsel (384 U.S. at 875). In the instant case, the jury deliberated for three days before reaching a verdict of guilty on thirteen counts and not guilty on two. In light of the fact that five or six years had elapsed between the events at issue and the time of trial, no one can say that, had defense counsel been given access to the grand jury transcript, they could not have found material useful for additional refreshment, explaining or expanding upon testimony adduced by the government, and swinging the jury in petitioner's favor.

II. Owing to the Intent Issue Which Was Common to All Counts, the Error Found to Exist Was Not Confined to Counts 11-13, but Tainted Counts 1-10 as Well

The question of petitioner's intent, the basic and most hotly contested issue in the entire case, was common to all counts. The government contended that petitioner's plan was the same in the distributor areas and in the greater Kansas City area, to-wit, the disciplining or elimination of the gallon jug operators by conspiratorial, predatory pricing.[23] It urged that this plan was carried out in all the

23. See note 7, *supra.*

indictment areas in substantially the same period of time by the same personnel, principally Stewart, Flanagan and Baird, petitioner's Kansas City plant officials.[24] Petitioner, on the other hand, contended, and introduced evidence to show, that its pricing was purely defensive and designed to retain its business against competitors who had aggressively initiated the price decreases. On this bitterly-fought intent issue, both the refreshment witnesses themselves and the refreshment procedure had a substantial impact.

The trial court instructed the jury that it could consider evidence of prior conduct which had been received in one count in deciding petitioner's intent in other counts (App. A-280—A-284). Thus, although the testimony of five of the refreshment witnesses was offered in the first instance to make out the government's case in Counts 11-13, the government expressly stated that that testimony was not confined to those counts, and the fact that these witnesses did testify on the intent issue and some of them were actually refreshed on this point, coupled with the court's instruction which permitted the jury to consider their testimony on the intent question in the other counts, foreclosed any possibility that the error of non-disclosure found as to Counts 11-13 would not be equally applicable to Counts 1-10 (see pp. 8-10, *supra*). Of course, since two of the refreshment witnesses (Stewart and Baird) were defense witnesses who testified as to all counts, the error of non-disclosure of their testimony could in no event be said to be confined to Counts 11-13.

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24. The bills of particulars named each as a co-conspirator in all Sherman Act counts (III Pl. 422, 424, 428).

III. Petitioner Was Denied a Fair Trial, Contrary to the Fifth and Sixth Amendments to the Constitution, by Virtue of the Refreshment Procedure Utilized and the Trial Court's Refusal to Order Production of the Transcripts

In this case, the use of the grand jury transcript by the government and the trial court's refusal to order production thereof threatened the "very integrity of the fact-finding process"[25] and raised fundamental constitutional questions of fair trial and confrontation of witnesses guaranteed by the Fifth and Sixth Amendments.[26]

Compounding the intrinsic prejudice resulting from the one-sided availability of the transcripts, the procedure followed placed before the jury matter which was not in evidence, and denial of petitioner's motions for inspection made confrontation and cross-examination utterly impossible. Five of the refreshment witnesses adopted certain key portions of their grand jury testimony after testifying, following attempted refreshment, that they did not presently recollect the pertinent facts adopted.[27] Denying disclosure of the transcripts to petitioner for its possible use in further examination of the witnesses prevented any effective confrontation of the witnesses on the subject matter of the adopted testimony—including testimony on the intent issue—and deprived petitioner of its constitutional rights.

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25. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

26. See Jencks v. United States, 353 U.S. 657 (1957) ("constitutional overtones" involved in one-sided availability of witnesses' statements in hands of government—see Palermo v. United States, 360 U.S. 343, 362-63 (1959) (concurring opinion of Mr. Justice Brennan)); Brady v. Maryland, 373 U.S. 83 (1963) (constitutional question involved in one-sided availability of "evidence favorable to an accused" in the hands of the government).

27. See App. A-199, A-213—A-214, A-220, A-246—A-247, A-253—A-254, A-259—A-261.

The principle is the same as that in *Robbins* v. *Small,* 371 F.2d 793 (1st Cir. Jan. 31, 1967), *cert. denied,* 386 U.S. 1033 (May 8, 1967). There a prosecutor examined a hostile prosecution witness with leading questions, utilizing a signed, extra-judicial statement made by the witness. In this manner, the prosecutor placed before the jury the contents of the prior statement, despite the witness' claim of his Fifth Amendment right against self-incrimination. The First Circuit Court of Appeals held that this procedure violated the defendant's constitutional rights to a fair trial and confrontation of witnesses in that it brought to the jury's attention the substance of a statement that was not in evidence and, therefore, not subject to cross-examination.

Robbins' parallel to this case is clear. In each case a defendant was foreclosed from cross-examining the witness about his prior statement—in *Robbins,* because the witness was claiming his Fifth Amendment right, and in the instant case, because the witness had no present recollection of facts which he had adopted, and petitioner could not cure the defective recollection by further refreshment because the transcript was not disclosed. In both cases "non-confrontation" matter was called to the jury's attention—in *Robbins,* from the statement, and here, from the grand jury transcript.

This procedure, coupled with the facts that (1) the Court of Appeals found error in the non-disclosure of the transcript as to Counts 11-13, (2) portions of the adopted testimony related to the intent question, and (3) the trial court's instruction permitted the jury to consider intent evidence—including the adopted testimony—in all counts, demonstrates that petitioner was deprived of its rights guaranteed by the Fifth and Sixth Amendments.[28]

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28. Petitioner urged this point in both courts below. The trial court dismissed the point, holding that no constitutional issue was involved, and the Court of Appeals ignored the point in its opinion.

IV. The Court of Appeals Misconstrued and Misapplied the Mandate of This Court and Disregarded the Rule in O'Connor v. Ohio in Holding That Petitioner Waived Its Right to Inspect the Grand Jury Testimony of Non-Refreshment Witnesses

Following remand of this case to the trial court, petitioner renewed its motion for a new trial, assigning as a ground (additional to those previously assigned in this Court in its prior petition for certiorari) that petitioner, in fairness, should have a trial at which it was accorded the right, consistent with *Dennis,* to inspect the grand jury testimony of thirty important government witnesses—most of them intensely hostile—who testified at trial, but whose transcripts were not requested by defendant because they had not been used at trial for refreshment. The record shows that government counsel utilized the transcripts of these witnesses' grand jury testimony to prepare them to testify against petitioner (see, *e.g.*, App. A-204—A-209) and, thus, had full advantage of the "exclusive access to a storehouse of relevant fact" condemned by this Court in *Dennis* (384 U.S. at 873). Nonetheless, the trial court denied petitioner's motion without comment and the Court of Appeals refused to review the merits of petitioner's motion on this point under the rule that a party may not assign error (other than "plain error") for the first time in the reviewing court.

This rule has no application here, because at the time of trial recent decisions of the Eighth Circuit Court of Appeals[29] precluded petitioner's obtaining disclosure of non-

29. Hance v. United States, 299 F.2d 389 (8th Cir. 1962); Brilliant v. United States, 297 F.2d 385 (8th Cir. 1962); Berry v. United States, 295 F.2d 192 (8th Cir. 1961), *cert. denied,* 368 U.S. 955 (1962). Moreover, under *Brilliant,* 297 F.2d at 391, a defendant was even precluded from asking the witness whether there was any such inconsistency.

refreshment witnesses' testimony without an advance showing of inconsistency between the trial and the grand jury testimony of those witnesses, a showing it was impossible for petitioner to undertake without access to the transcript. Petitioner was additionally inhibited from making such a motion by this Court's decisions in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958), and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959), both of which appeared to authorize much less extensive disclosure than was later ordered in *Dennis*. Moreover, in light of the trial court's consistent refusal to permit defense inspection of the grand jury transcript even where used by the government for refreshment, it was perfectly clear to petitioner's counsel that any such motion would have been completely futile.[30]

It was not until *Dennis* was decided, while the instant case was still pending before this Court on the original petition, that petitioner had any supportable basis for seeking disclosure of the grand jury testimony of the thirty non-refreshment witnesses. Because of this, the "waiver" rule applied by the Court of Appeals has no application here.

The rule which should have been applied is the one stated in *O'Connor* v. *Ohio*, 385 U.S. 92 (1966).[31] In that case this Court held that a defendant's failure to object to a long standing state court practice permitting a prosecutor to comment on a defendant's failure to testify did not strip him of

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30. At one point, the trial court commented "my view of the law is that I can't do that," *viz*, permit *any* disclosure (App. A-270; see also App. A-167).

31. *Accord*, England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422-23 (1964).

his right to attack that practice following its invalidation by this Court.[32]

The Court said (385 U.S. at 93):

> ". . . [O'Connor's] failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court."

Paraphrasing the Court:

> "[National's] . . . failure to object to a practice which [the Eighth Circuit] . . . had long allowed cannot strip [National] . . . of [its] . . . right to attack the practice following its invalidation by this Court."

The instant case calls even more strongly for the application of this rule. This Court restated the principles governing the disclosure of grand jury testimony in *Dennis*, and, on the same day, it specifically remanded this case, then pending on a petition for certiorari, for further consideration in light of *Dennis*. Thereafter, having for the first time a supportable basis for its motion, petitioner presented it to the trial court, who denied the motion. This ruling was appealed to the Court of Appeals which affirmed the trial court's ruling on a waiver theory, despite

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32. Although O'Connor had not raised this objection at trial, in his state court appeals, or in his first petition to the Supreme Court (he raised the point for the first time in a petition for rehearing of the Court's denial of the petition for certiorari (382 U.S. 286)), this Court considered the question and remanded the case to the Ohio Supreme Court for reconsideration in light of Griffin v. California, 380 U.S. 609 (1965), an intervening precedent wherein the Court changed the law. Upon remand, the Ohio court adhered to its prior ruling on the ground that no objection had been made at trial. In a *per curiam* opinion, this Court granted certiorari and summarily reversed the Ohio court (385 U.S. 92).

this Court's remand order requiring further consideration in light of *Dennis* and despite this Court's decision in *O'Connor*.

V. Both Lower Courts Misapplied This Court's Prior Opinion on the Robinson-Patman Act Charges in This Case, Thereby Permitting Petitioner To Be Convicted Under Standards Falling Below the Constitutional Requirements Established by the Court for This Case

On the trial, the trial court misapplied every key element of this Court's carefully delineated constitutional guidelines for this case set forth in its opinion in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29 (1963), upholding the constitutionality of Section 3 of the Robinson-Patman Act. The results of these errors are three-fold. First, the petitioner has been deprived of the right to be tried according to the law of this case established by this Court in the prior appeal. Second, the interpretations adopted by the lower courts have raised serious legal issues on points which are basic to the administration of this law, and obedience to it. Third, by departing from this Court's standards for this case, the lower courts have carried the law into an unconstitutional application.

A. The Trial Court's Instructions Authorized Conviction upon a Presumed Intent, Rather Than Requiring a Finding of "Specific" Intent to Destroy Competition, Contrary to This Court's Prior Holding

Notwithstanding the fact that, on the constitutionality appeal, the government urged,[33] and this Court held, that the requirement for proof of a "specific" intent to destroy

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33. "The requirement of a specific, evil intent immediately eliminates the danger that anyone will be convicted of crime merely because his prices are found too low by a court or jury" (Government's Brief on Reargument, p. 23, United States v. National Dairy Products Corporation, 372 U.S. 29 (1963).

competition saved Section 3 from being unconstitutionally vague (372 U.S. at 35, 37, App. A-150, A-151—A-152), both courts below have treated as sufficient a mere "general" intent, allowed to be presumed by the jury from mere selling below cost and adverse effects upon some competitors.

It is no answer to say, as did the Court of Appeals, that the "jury was . . . required to make 'a finding of predatory intent beyond a reasonable doubt . . .'" (350 F.2d at 335; App. A-110), because, in instructing the jury under the Sherman Act *how it should determine intent,* the trial court instructed in terms of general intent: "the law presumes that persons must be held to have intended the necessary and direct consequence of their acts" (App. A-296 n.). This presumed intent concept was carried into the Robinson-Patman counts by the trial court when he gave the illustration in his Robinson-Patman charge that a workman casting a beam off a building in a city and causing harm to a person below "is dealt with as if he foresaw it, whether he does so in fact or not" (App. A-296). Nowhere did the trial court inform the jury that a different standard of determining intent was required to convict under the Robinson-Patman Act charges and nowhere did he charge the jury as to the more stringent requirements for proof or "specific" intent or instruct that it could not be presumed from the fact or the consequences of petitioner's challenged sales.[34]

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34. In its Brief in Opposition to petitioner's former petition for certiorari, the government did not deny that the jury was instructed in terms of "general intent" under the Sherman Act, and it was unable to cite a single instance where the jury was instructed that a different character of proof was required to establish "specific intent" (Brief in Opposition, pp. 18-19, National Dairy Products Corporation v. United States, 384 U.S. 833 (1966). Moreover, the trial court's repeated references in his Robinson-Patman Act charge to the alleged "effects" of petitioner's pricing could only heighten the jury's impression that the requisite intent could be presumed therefrom (see App. A-299—A-302).

Although proof of "general" intent is sufficient to establish a Sherman Act violation[35] (except attempt to monopolize), Section 3 of the Robinson-Patman Act can be rationalized with the national policy favoring vigorous price competition only if its prohibition is confined to low prices shown to have been adopted for the planned purpose of destroying competition. Otherwise—as in the case at bar—a "general" intent instruction authorizes the jury to impute the requisite evil motive to a seller from the facts that he knowingly dropped his prices and competitors were injured. He is dealt with not only "as if he foresaw" such injury—in the language of the trial court's example—but as if the elimination of or injury to competition was his objective in lowering his prices.

Under our system of law, a low-price seller should no more be convicted under Section 3 without proof of specific intent to destroy competition than should a large company be convicted of attempting to monopolize in violation of Section 2 of the Sherman Act without proof of specific intent to do so (*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945)),[36] or a taker of property be convicted of theft without a showing of specific intent to steal (*Morissette* v. *United States*, 342 U.S. 246, 264 (1952)). The general intent instructions of the trial court deprived petitioner of a vital safeguard to its rights and, if permitted to stand as a precedent, will not only weaken the rights of those criminally tried in the future, but will threaten basic price competition — "the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1949)).

B. In His Jury Instructions, the Trial Court Set Forth Incorrect Standards and an Erroneous Burden of Proof on the Issue of "Meeting Competition"

On the constitutionality appeal this Court stated ex-

35. *E.g.*, United States v. Patten, 226 U.S. 525, 543 (1913).

36. This portion of the *Alcoa* decision was cited with approval in United States v. Griffith, 334 U.S. 100, 106 (1948).

pressly that below-cost sales made for a "legitimate commercial objective" such as to meet "a lawful, equally low price of a competitor" would "neither be 'unreasonably low' nor made with predatory intent."[37] Since the issues of "unreasonably low" and "predatory intent" are indispensable elements in the alleged crime and, therefore, part of the government's burden of proof, the Court, of course, did not say that petitioner would have the burden to establish meeting competition, or any other facts, to *negative* them.

This Court did, however, define the charge to be proved under Section 3 as "sales made below cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37; App. A-151—A-152). At the very least, this holding means that if evidence should develop—as it did here in the government's own case[38]—that the allegedly unlawful low-price sales were made by the seller in order to meet competition, it was the government's burden to overcome that evidence.[39]

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37. 372 U.S. at 36-37; App. A-151. The Court also indicated that a below-cost sale was not unreasonably low if "mitigated by some acceptable business exigency" (*id.* at 33; App. A-148).

38. For example, evidence under Count 2 showed that before petitioner reduced prices to its Paola distributor, it had been informed that a major competitor had reduced its prices in the area, and a newspaper advertisement by a food chain customer served by that competitor tended to confirm this report (R. 3371-91, 3578, 3604-12).

39. In arguing that the defense has "the burden of coming forward with the evidence on meeting competition" and that the government need not "negative . . . possible justifications" (Brief in Opposition, note 34, *supra*, p. 19), government counsel repudiated entirely the earlier representations to this Court in its constitutionality appeal that petitioner was charged with selling "at less than [its] own costs, *without reasonable justification*," and "[u]nless the government proves this misconduct there must be an acquittal" (see Government Brief on Reargument, note 33, *supra*, p. 18; emphasis added).

Notwithstanding this background, the trial court placed upon petitioner the burden of establishing a "good faith meeting competition defense" (App. A-290). His meeting competition instructions obviously were adopted from the affirmative defense contained in Section 2(b) of the Robinson-Patman Act amendment to the civil Clayton Act. This was totally erroneous, for it is only "at any hearing . . . under this section," and only upon a "person charged with a violation of this section" (*i.e.*, Section 2, the civil section) that Section 2(b) places the burden of showing justification upon a seller.[40]

Moreover, in instructing that the competitive price being met must be "lawful" and "in fact . . . in existence,"[41] the trial court attached conditions even stricter than those applicable to the Section 2(b) proviso in civil cases. A seller claiming the civil defense under Section 2(b) perhaps must show that he reasonably *believed* that the price he met was lawful,[42] but no case holds that the actual "lawfulness" of a competitor's price must be proved in order to establish even a civil meeting competition defense, and the proposition that Section 2(b) requires a seller to show that he "in fact" met a competitive price was specifically rejected by this Court in *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945).

The trial court added to the already heavy burden he

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40. See App. A-154—A-155.

41. See App. A-288, A-289, A-290, A-293, A-295. Although this Court had referred to the "need to meet a lawful, equally low price of a competitor" (372 U.S. at 36-37; App. A-151), this clearly was given an *example* of a "legitimate commercial objective" and was not intended to establish a standard for every meeting competition question.

42. See Att'y Gen. Nat'l Comm. Antitrust Rep. 181 (1955); Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).

had placed upon petitioner by cautioning the jury that testimony claiming "meeting competition" as justification was "simply a conclusion . . . of the witness" and a "mechanical word formula,"[43] and he confusingly compared the gasoline business (where there was a known differential between "name brand" gasolines and others) to the milk business (where there was no evidence of any established differential between milk in different containers).[44]

The Court of Appeals' opinion upholding the trial court's instructions did not mention petitioner's contentions (which were strongly opposed by the government) on the "meeting competition" question, and the serious issues raised thereby remain unresolved.

As a criminal statute, Section 3 must be strictly construed.[45] Over-all, the trial court's Robinson-Patman instructions, approved by the Court of Appeals, not only do violence to this principle but raise serious and novel questions concerning the administration and application of Section 3.

Unless this Court shall act, the rules that a seller is suspect if he fails to make a net profit; that a jury, looking at competitive effects, may presume that a seller has anticompetitive motives; and that a seller may have to prove his innocence under strained and unrealistic standards governing "meeting competition," cannot help but deter price competition and thereby contravene basic antitrust policy. See *Auto-*

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43. See App. A-288, A-289.

44. See App. A-292—A-293. Arguing that there *ought to be* some differential, the government conceded in the Court of Appeals that "there was not unanimity as to what the differential should be. . . ." (Brief for Appellee United States, note 8, *supra*, p. 130 n. 110).

45. See United States v. Boston & Maine R.R., 380 U.S. 157 (1965).

matic Canteen Co. v. *FTC,* 346 U.S. 61, 63, 73-74 (1953); *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 4 (1958).

For the reasons hereinabove set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

APPENDIX
To
Petition for A Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,737.

National Dairy Products Corporation, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

[October 27, 1967.]

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, Circuit Judges.

MATTHES, Circuit Judge.

National Dairy Products Corporation (National) was convicted on seven counts of an indictment charging a conspiracy to fix prices and eliminate competition in the sale of milk in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and on six counts charging price discrimination in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a). We affirmed the judgment of conviction. *National Dairy Products Corporation* v. *United States*, 350 F.2d 321 (8th Cir. 1965).

On the first appeal National contended that the district court had committed prejudicial error in denying defense counsel the right to inspect selected portions of the grand

jury testimony utilized by the prosecution for refreshing the recollection of certain government witnesses. Considering the posture of the law at that time we found no error in the denial. 350 F.2d at 330-33. On June 20, 1966 the Supreme Court granted National's petition for certiorari, vacated the judgment of this Court and remanded the case to the district court "for further consideration in light of *Dennis* v. *United States,*" 384 U.S. 855 (1966), decided on the same date. *National Dairy Products Corp.* v. *United States,* 384 U.S. 883 (1966).

Upon remand, after consideration of briefs and oral argument, the district court denied National's motion for a new trial and reentered its judgment. The court's lengthy and exhaustive opinion is reported at 262 F.Supp. 447 (W.D. Mo. 1967).

National has appealed. Basically it contends that under the teachings of *Dennis* the district court erred in failing to grant a new trial on all counts. We reverse as to counts eleven, twelve and thirteen and affirm the judgment as to the remaining counts.

Inasmuch as the procedure adopted and utilized at the trial in connection with the use of the grand jury testimony has been fully discussed in opinions of the district court[1] and our prior opinion, we limit our discussion of that procedure to the bare essentials.

It stands undisputed that the goverment's use of the grand jury testimony was limited to the attempted refresh-

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1. See *United States* v. *National Dairy Products Corp.*, 231 F.Supp. 663 (W.D. Mo. 1964), denying appellants' post-trial motions for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial; *United States* v. *National Dairy Products Corporation,* 262 F.Supp. 447 (1967), denying National's motion for a new trial on remand.

ment of seven government witnesses in connection with the so-called Kansas City charges. (Counts eleven, twelve and thirteen).[2] The refreshment procedure formulated by the district court was tacitly agreed to by counsel for National. They did, however, move repeatedly and unsuccessfully to inspect those portions of the grand jury transcript utilized by the government, and all other portions relating to the same subject matter. 350 F.2d at 330.

In considering and denying National's motion for a new trial upon remand, the district court concluded on the basis of its interpretation of *Dennis* that National had failed to demonstrate a "particularized need" for its use of the grand jury testimony.[3] The district court obviously premised its conclusion on the dissimilarity between this case and the five circumstances present in *Dennis* which the Supreme Court held constituted a showing of particularized need "substantially beyond the minimum required by Rule 6(e) and the prior decisions of this Court." 384 U.S. at 872-73.

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2. Counts eleven and twelve alleged Sherman Act violations; count thirteen alleged a Robinson-Patman Act violation.

3. The district court found: (1) National did not attempt to show, and did not contend at trial, that it had established any "particularized need"; (2) the grand jury testimony was not used for impeachment purposes or introduced as substantive evidence; (3) the refreshment witnesses were evasive, reluctant to testify, and hostile to the government; (4) there was no inconsistency between any government witness' trial testimony and his grand jury testimony; (5) the charges could be proved exclusive of the testimony given by the refreshment witnesses, and the guilt or innocence of National did not turn on the testimony of these witnesses; (6) National did not suffer any prejudice as a result of the court's rulings on the grand jury transcript; (7) the nondisclosure of the grand jury transcript was not reversible error *per se*, but assuming *arguendo* that error was committed, it was harmless error under Rule 52 of the Federal Rules of Criminal Procedure.

We believe the district court misinterpreted the standard established by *Dennis*, which is applicable to this case.

Unlike the situation in this case, the prosecution in *Dennis* did not utilize the grand jury transcript at trial. The defense, however, moved for the production of the grand jury testimony of certain prosecution witnesses for impeachment purposes. The motions were denied on the ground that no "particularized need" had been shown. The Court of Appeals found no reversible error. 346 F.2d 10 (10th Cir. 1965).

In a unanimous opinion as to this issue the Supreme Court reversed and remanded, and held that the defendants were entitled to examine the grand jury transcript relating to the trial testimony of four government witnesses.

Speaking for the Court Mr. Justice Fortas pointed out that the Supreme Court has on several occasions recognized the "'long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.' *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681, [and] * * * has ruled that, when disclosure is permitted, it is to be done 'discretely and limitedly.' *Id.* at 683." 384 U.S. at 869. He emphasized, however, the fact that the Supreme Court "has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony 'preliminarily to or in connection with a judicial proceeding.'" *Id.*, at 869-70.

Of greater significance to our case is the Court's statement based on *United States* v. *Procter & Gamble Co.*, *supra* at 683, that "'problems concerning the use of the grand jury transcript at the trial to impeach a witness, *to refresh his recollection*, to test his credibility * * *"

are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.'" *Id.*, at 870 [Emphasis added]. The Court also observed that the developments in the area of disclosure of grand jury minutes were entirely consistent with the realization that disclosure, rather than suppression of relevant legal materials, normally promotes the proper administration of criminal justice. Of added significance, we feel, is the fact that the Court cited the Jencks Act, 18 U.S.C. § 3500, as indicative of the trend towards liberal disclosure. *Id.*, at 870-71.

We refrain from a prolonged discussion of other significant pronouncements of the Court in *Dennis*. Manifestly the Supreme Court has substantially liberalized the standards to be applied in determining whether disclosure is required. In relaxing these requirements, we are led to believe that in a case where, as here, the government is permitted at trial to use the grand jury transcript, the discretionary power of the district court to limit disclosure is restricted.[4]

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4. The Court recognized that *in camera* inspection by the trial judge may be useful for certain purposes, but that it by no means disposes of the matter. The Court stated: "• • • In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process; for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. *Cf.* Fed. Rule Crim. Proc. 16(e), as amended in 1966; 18 U.S.C. § 3500(c)."

We interpret *Dennis* as enunciating the proposition that where the district court permits the government to use the grand jury transcript to refresh the recollection of certain government witnesses, a showing of particularized need has been made, and upon request the trial judge must grant the defense counsel the right to inspect that portion of the transcript used and other portions relating to the same subject matter.

In our view the Supreme Court in *Dennis* considered the circumstances of that case for the purpose of demonstrating that a defendant may show that a particularized need exists for disclosure even though the transcript had not been used at trial or inspected by the trial judge *in camera.*

Post-*Dennis* decisions lend support to our views. In *United States* v. *Youngblood*, . . . F.2d . . . (2d Cir. 1967), the grand jury transcript had not been utilized by the government. The district court had refused to grant defense counsel the right to inspect the grand jury testimony of a key government witness. The Second Circuit held that tested by the criteria laid down in *Dennis* Youngblood's showing of particularized need was substantially weaker than that made by the defendants in *Dennis.* Under these circumstances the refusal of the trial court to order disclosure did not constitute error. That Court nevertheless recognized the propriety and fairness of allowing the disclosure of the grand jury testimony of key prosecution witnesses, and consequently directed that at trials commencing after its judgment in *Youngblood* had been entered, the district court of that Circuit at the request of the defendant should order the disclosure of the grand jury testimony of those witnesses who testified at his trial without requiring a showing of any particularized need.

Cargill v. *United States*, . . . F.2d . . . (10th Cir. 1967), presented the question whether defense counsel were entitled upon motion to inspect the grand jury testimony of a key government witness where that testimony was not used by the government at the trial.

The Tenth Circuit interpreted the *Dennis* opinion as abrogating the substance while retaining the form of the particularized need requirement. It adopted a course of wide open disclosure, subject to a protective order, whenever the defense makes a specific request for a transcript of the witnesses' grand jury testimony to be used in his cross-examination or for one of the other purposes mentioned in *Dennis*. In reversing Cargill's conviction the court stated *inter alia:*

> "The Court [in *Dennis*] retains the requirement that 'particularized need' be shown in order that the secrecy may be lifted, but holds *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement, although it has retained the term. Under this opinion, it appears that the defense is entitled to the grand jury transcript of the witness's testimony when the jury's functions are ended, and when the request is made during the course of trial that it is necessary for the purpose of cross-examining such witness for the above mentioned purposes." . . . F.2d at . . . .

Worthy v. *United States*, . . . F.2d . . . (D.C. Cir. 1967), is factually similar to *Cargill* in that the district judge refused to permit defense counsel to examine the grand jury testimony for possible inconsistencies between the testimony of a government witness before the grand jury

and at trial. Following remand by the Supreme Court for further consideration in light of *Dennis*, the district court denied the motion for a new trial, holding that while there had been an apparent showing of "particularized need" under the standards of *Dennis*, the defendant had not been prejudiced by the government's nondisclosure.

The Court of Appeals in a per curiam opinion reversed and remanded, and held that the defendant was prejudiced by his inability to examine the grand jury transcript for inconsistencies between the witness' grand jury and trial testimony. The Court, moreover, concluded that the circumstances in *Worthy* were sufficient to require disclosure under a showing of particularized need.

We do not regard the holding in *Dennis* to require the practice adopted by the Second Circuit in *Youngblood, supra.* Neither do we subscribe to the concept that the defense is entitled to the grand jury transcript upon timely request irrespective of the circumstances involved which seems to be the rule established for the Tenth Circuit in *Cargill, supra.* We believe a showing of "particularized need" under the *Dennis* standards is still required. We hold only that where the prosecution itself has used the grand jury testimony during the course of the trial, that fact in itself is sufficient to constitute a showing of particularized need. Otherwise, a showing of particularized need depends upon the circumstances of each case.

Thus defendant, National Dairy, has established a particularized need for disclosure of the pertinent grand jury testimony that was utilized by the government and related grand jury testimony. Consequently we conclude that the court committed prejudicial error in denying the defense the right to inspect such grand jury testimony, but that such error affects only counts eleven, twelve and thirteen.

With respect to the Sherman Act counts, the jury was instructed that each count charged a separate conspiracy, and that evidence relating to one Sherman Act count could not be considered in support of the charge under any other Sherman Act count, except on the issue of intent. This solitary exception permitted the jury when considering one of the Sherman Act counts to also consider evidence of any earlier occurrences pertaining to another Sherman Act count "which * * * [it] might find would bear also upon National's intent in the count under consideration." Focusing upon this instruction, National argues that the error of the district court in denying it the right to limited inspection spilled over and infected all of the counts in the indictment, and thereby deprived it of a fair trial on the question of intent, a central issue in all counts. We disagree.

We are cited to no authorities in support of this contention. Neither do National's briefs state with any specificity wherein the refreshment process produced any damaging intent evidence. In this connection we notice that on the former appeal National did not rely upon the "intent" aspect of the refreshment process as ground for a new trial on all counts.[5] Rather its contention, abandoned on this appeal, was that the prosecution had resorted to the grand jury testimony as substantive evidence, not to refresh the recollection of its witnesses, but to impeach them.

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5. Counsel for National filed two post-trial motions for judgment of acquittal n.o.v. or in the alternative for a new trial. One motion was addressed to "counts one through ten." The other related to "counts eleven, twelve and thirteen." Only in the latter motion did National assign error with respect to the court's denial of the right to inspect that portion of the grand jury transcript used for refreshment purposes. Neither motion asserted that the error resulting from the denial of the right to inspect permeated counts one through ten.

The record, moreover, is replete with instances wherein the Court and counsel for all parties recognized the limited thrust of the government's action in resorting to the use of the grand jury transcript. The entire purport of the refreshment process was to refresh the memory of witnesses who were evasive, indefinite, and reluctant to testify materially on behalf of the government. Four out of the seven refreshment witnesses were officers or employees of National, while the remaining three were either past or present employees of National's co-conspirators. The record is clear that not only did these witnesses testify primarily with respect to the events in counts eleven, twelve and thirteen, but also their testimony was utilized by National as a partial basis for presenting its defense before the jury.

Notwithstanding the district court's instruction on the coalescence of intent evidence, we are not inclined to hold that the refreshment process prejudicially affected appellant's rights as to counts one through ten, particularly in light of the few instances in which any of the witnesses were actually refreshed. The record discloses that resort to the grand jury transcript produced only a minutia of substantial evidence. In most instances the witness either testified that he was not refreshed or attested to the veracity of his testimony before the grand jury. The record reveals, moreover, that such testimony was merely cumulative and that there was an abundance of other evidence, both verbal and documentary, to support the convictions under counts one through ten.[6] Thus, if we as-

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6. Of added significance, we feel, is the fact that on the former appeal National in effect conceded a submissible case as to all counts, except one and two, eleven and thirteen. See *National Dairy Products Corporation* v. *United States, supra* at 324.

sume *arguendo* that the error affecting counts eleven, twelve and thirteen did extend to the remaining counts, such error was harmless and did not affect the substantial rights of National as to counts one through ten. See *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946).

National also contends that it is entitled to a new trial on the ground that it did not receive access to the grand jury testimony of numerous "non-refreshment" witnesses. This assignment of error is without substance.

Counsel for National concede, as indeed they must, that at no juncture of the trial did they move to inspect the grand jury transcript of the non-refreshment witnesses. On November 3, 1966, after remand, National for the first time moved for a new trial on the premise that it had been denied the grand jury testimony of the non-refreshment government witnesses. National attempts to justify its failure to take appropriate action in the district court to preserve its claim of error for review by asserting that the teachings of the Supreme Court in *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958) and *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959) precluded "wholesale discovery." Hence it submits that a timely motion to inspect the testimony of the non-refreshment witnesses would have been futile.

We find no support in *Dennis* or the prior cases of the Supreme Court which relieved the defense from protecting its rights by timely motion to inspect. There is no authority which requires a district judge to grant access to grand jury testimony of trial witnesses, absent a timely and proper request. To the contrary, this is a prerequisite, not only as to inspection of the grand jury transcript, but also to statements encompassed in the Jencks Act. 18 U.S.C. § 3500 (1957). See, *e.g., Banks* v. *United States,* 348

F.2d 231, 234 (8th Cir. 1965); *Lewis* v. *United States,* 340 F.2d 678, 682 (8th Cir. 1965). Even under the liberal rule adopted by the Second Circuit in *Youngblood, supra,* the defense is required to move for inspection.

Furthermore, National's argument runs counter to the firmly established principle that absent a clear showing of plain error affecting substantial rights of the defendant, a reviewing court will not consider matters not properly presented to the trial court. See, *e.g., McNeely* v. *United States,* 353 F.2d 913, 917 (8th Cir. 1965); *Osborne* v. *United States,* 351 F.2d 111, 117 (8th Cir. 1965); *Craig* v. *United States,* 337 F.2d 28, 29 (8th Cir. 1964), *cert. denied,* 380 U.S. 909 (1965). National, however, has failed to demonstrate that it is entitled to invoke the plain error rule.

The judgment is reversed and cause remanded as to counts eleven, twelve and thirteen, and affirmed in all other respects.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,737
September Term, 1967

National Dairy Products Corporation,
Appellant,

vs.

United States of America.

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed and the cause remanded as to Counts Eleven, Twelve and Thirteen of the Indictment.

And it is further Ordered by this Court that the Judgment of the said District Court be, and is hereby, affirmed in all other respects.

October 27, 1967.

Order entered in accordance
with Opinion:—

/s/ROBERT C. TUCKER

Clerk, U.S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 18737

National Dairy Products Corporation,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 21, 1967.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIONAL DAIRY PRODUCTS CORPORATION,
Defendant.

No. 20542

MEMORANDUM OPINION AFTER SUPREME COURT REMAND TO GIVE FURTHER CONSIDERATION TO THIS CASE IN LIGHT OF DENNIS v. UNITED STATES, 384 U.S. 855

Pursuant to the mandate and per curiam opinion of the Supreme Court in *National Dairy Products Corp.* v. *United States,* 384 U.S. 883, we have given further consideration to this case in light of *Dennis* v. *United States, supra.* Our findings of fact and conclusions of law are stated in this memorandum opinion. For reasons we state in detail, defendant's postmandate motion for new trial is denied. What we believe is an appropriate order is entered at the conclusion of this memorandum opinion.

I. Summary of Defendant's Postmandate Motion for New Trial

As a part of the postmandate proceedings, defendant filed a motion of record "in order to formalize defendant's motion for new trial, and the grounds therefor, as heretofore set forth in its briefs."[1]

That postmandate motion asserts two grounds in support of new trial. In regard to its first ground, defendant alleged:

As its first ground for a new trial, defendant states that government counsel, at the trial of this case, pursuant to leave of Court, utilized portions of the prior testimony of the following witnesses before the grand jury for the stated purpose of refreshing their recollections: Arthur Augenstein, John Flanagan, Frank Gardner, John W. Baird, David W. Stewart, Vincent Crimmins and Edward H. Gilmore (sometimes hereinafter referred to as "refreshment witnesses"). It is undisputed that in each instance, defense counsel moved to inspect the portions of the grand jury transcripts so utilized and all other portions concerning the same subject matter, and these motions were denied. The seven persons hereinabove listed were important witnesses at the trial and played important roles in the events at issue under the charges of the indictment (as set forth in defendant's briefs, including particularly Brief of Defendant on Remand dated September 16, 1966, pp. 15-17, and Appendix A thereto). By reason of these facts, defendant had a "particularized need" to inspect portions of the refreshment witnesses' grand jury testimony related to their testimony on direct examination at the trial, and other testimony relevant to the charges of the indictment, and denial of defendant's motions therefor constituted reversible error.

The second alleged ground of defendant's postmandate motion relating to "non-refreshment witnesses"—i.e., witnesses whose grand jury testimony was not utilized for the refreshment of the testimony of any trial witness—contains the allegation that:

Defendant's attorneys made no motion to inspect pertinent grand jury testimony of the non-refreshment witnesses inasmuch as government counsel did not utilize the same at trial for impeachment or to refresh recollection, and defendant's attorneys believed that they were precluded from inspecting said grand jury transcripts under the decisions of the United States Supreme Court in *United States* v. *Procter & Gamble*

Co., 356 U.S. 677 (1958), and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959).[2]

It was also there alleged that:

> As its second ground for a new trial, defendant states that government counsel had access to the grand jury transcripts of numerous other important prosecution witnesses (hereinafter sometimes referred to as "non-refreshment witnesses"), and understands that they utilized the same outside the courtroom in preparing said persons to testify against defendant.

Defendant then alleged that "the non-refreshment witnesses were in most cases hostile to defendant, and they gave testimony which was helpful to the prosecution and harmful to the defense, and defendant's counsel had no access to their grand jury testimony." The names of the non-refreshment witnesses, some thirty in number, were set forth and defendant alleged that its postmandate claim of "particularized need" was established by the alleged fact that all of those witnesses were, for various alleged reasons, hostile and adverse to the defendant's interest. Defendant then alleged that:

> Defendant is without knowledge as to whether or not impeachment material or material otherwise useful to the defense is contained in the grand jury testimony of the non-refreshment witnesses hereinabove listed, but avers that there is a reasonable possibility that said testimony contains impeachment material, including statements inconsistent with, explanatory of, or useful in placing in proper perspective their testimony given at the trial, or otherwise useful to the defense. Defendant further has no knowledge as to whether the grand jury testimony of the non-refreshment witnesses hereinabove listed contains material which might have been affirmatively helpful to the defense and, having been forgotten or concealed by said persons, was not

called to their attention by government counsel; however, defendant believes there is a strong possibility that said grand jury testimony contains such material.

Defendant's legal contentions will be later stated in detail.

II. Defendant's Contention in Regard to Command of the Supreme Court's Mandate is Untenable

As a preliminary matter it must be noted that the parties are in radical disagreement in regard to the meaning of the Supreme Court's per curiam opinion and its mandate commanding that this Court give this case "further consideration in light of *Dennis* v. *United States*."

Defendant contends that the only "logical . . . and indeed reasonable — explanation . . . that the Supreme Court sent its mandate to this Court [was that it expected this court would] make the determination of whether the requested grand jury minutes were producible under the rules laid down in *Dennis*, and if so, to order a new trial — just as it would be required if the question involved the producibility of Jencks Act statements" (D.B. 10/28/66, p. 11).[3] Defendant insists that "the Supreme Court in effect directed [a new trial] in this case" (D.B. 11/18/66, p. 2). Defendant argued orally that the only reason the Supreme Court did not reverse *National Dairy* outright was because of the alleged existence of some sort of a general custom of courtesy that the Supreme Court allegedly extends to the lower federal courts (O. A. Tr. 16-17).[4]

At the time of oral argument, we expressed the tentative view that if defendant's contentions in regard to what the Supreme Court actually held in *Dennis* were tenable then "the only reasonable thing for the Supreme Court of the United States to have done would have been to have simply

reversed this case and sent it back for trial" (O.A. Tr. 38). Subsequent research and reflection has confirmed that tentative view.

The Court of Appeals for the Eighth Circuit recently received a similar remand from the Supreme Court in *American Guild of Variety Artists* v. *Smith,* 384 U.S. 30. The original judgment of the Court of Appeals reported in 349 F. 2d 975 was vacated and the case was remanded for further proceedings in light of *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715. The Court of Appeals' November 18, 1966 slip opinion on remand, *Smith* v. *American Guild of Variety Artists,* Nos. 17856 and 17857, .. F. 2d .., not yet reported, states that the Court of Appeals gave "careful consideration [to] the Supreme Court opinions in this case and *Gibbs*" with the understanding that "we are directed to apply the law as stated in *Gibbs* to our present case insofar as present issues are presented."

The Court of Appeals analyzed the rationale of *Gibbs* and noted that reversal had been based primarily upon the Supreme Court's determination that the standard of proof prescribed by §6 of the Norris-La Guardia Act had not been met. It also noted that the Supreme Court had full knowledge of the fact that the Court of Appeals had not considered §6 in its prior opinion. The Court of Appeals then commented:

> If the failure to consider §6 was error per se upon the record made whether or not the §6 issue was properly before the Court, we would assume the Supreme Court would have reversed outright as it did in *Gibbs.* (Page 5 of slip opinion of *William Smith, Doing Business as Smith Entertainment Agency and as Smith & Dale Circus* v. *America Guild of Variety Artists,* Nos. 17856 and 17857.)

The Third Circuit had much the same reaction to the Supreme Court's similar remand in *Joines* v. *United States,* 357 U.S. 573, in which it was directed to give further consideration to its earlier opinion reported in 246 F. 2d 278, in light of *Jones* v. *United States,* 357 U.S. 493. In complying with the Supreme Court's mandate, the Third Circuit commented in its opinion on remand, reported as *United States v. Joines,* 3 Cir. 1958, 258 F. 2d 471, that if the Supreme Court had considered a particular "decisive factor [to have been controlling] there would have been no purpose in remanding the case to us for further consideration." That case added that "on the contrary, [had] the Supreme Court . . . thought this undeniable fact controlling, [it] would certainly have reversed the defendant's conviction" (258 F. 2d at 472). Both the Eighth and Third Circuits adhered to their respective previous judgments. The Supreme Court denied certiorari in regard to the Third Circuit case. See *Joines* v. *United States,* 358 U.S. 880. The Eighth Circuit case is probably on its way back to the Supreme Court.

In *Henry* v. *City of Little Rock,* 376 U.S. 776, the Supreme Court explained that its remand practice for further consideration in light of another particular Supreme Court decision, at least in the case of such remands to state courts, does not amount "to a final determination of the merits" (376 U.S. at 777). That case added that the practice is followed where the Supreme Court is "not certain that the case was free from all obstacles to reversal on an intervening precedent" (376 U.S. at 776).

We therefore reject defendant's argument that the Supreme Court's mandate in effect required this Court to grant defendant a new trial.[5] We believe that the Supreme Court intended by its mandate that this Court give further consideration to this case in light of *Dennis;* that the principles

and standards recognized and applied in *Dennis* be ascertained and applied to the factual and procedural situation presented by this case; and that a new trial be granted in the event, but only in the event, it is determined that reversible error was committed.

III. Defendant's Contention that *Dennis* Established New Standards That Rest on a Constitutional Base is Not Tenable.

We determine at the outset that neither *Dennis* nor *National Dairy* involve the Constitution. Defendant's argument to the contrary will be stated and answered before the questions presented by *Dennis* and by this case are discussed.

Defendant reiterated at oral argument that *Dennis* is a "landmark case." At oral argument, however, defendant contended that *Dennis* was a *"landmark"* case in the same sense that *Brown* v. *Board of Education,* (O.A. Tr. 17), *Gideon* v. *Wainwright,* and *Douglas* v. *California* (O.A. Tr. 18), are "landmark" cases (O.A. Tr. 19; cf. D.B. 9/16/66, p. 5 and D.B. 10/31/66, p. 3). Defendant also there argued, for the first time, that *Dennis* was based on constitutional grounds (O.A. Tr. 167). Requested permission to brief that question was granted (O.A. Tr. 168).

Defendant made clear in its post-oral argument briefs that it indeed "contends that, under the Supreme Court's decision in *Dennis* . . . denial to a defendant of his right to inspect a grand jury testimony of an important prosecution witness involves deprivation of his right to due process under the Fifth Amendment" (D.B. 10/28/66, p. 2). Defendant now argues that "not only does the Supreme Court's opinion [in *Dennis*] establish that a defendant has a right to inspect grand jury transcript when used by

the prosecution at the trial, but by its specific reference to the Jencks Act it clearly imports that denial of that right constitutes reversible error, irrespective of any showing of inconsistency as between a witness' grand jury and trial testimony, or any other showing of prejudice" (D.B. 10/28/66, p. 14-15). Defendant also contends that when the Supreme Court ruled *Dennis,* it ruled a question that was "somewhat similar" to that ruled in *Brady* v. *Maryland,* 373 U.S. 83 (D.B. 11/10/66; see also D.B. 10/3/66, p 4).

Recognition of the fact that existing standards were in fact applied in the trial of *National Dairy* required that defendant argue that "new standards [were] laid down in *Dennis* (D.B. 9/16/66, p. 19); that "the standards set forth in *United States* v. *Procter & Gamble,* 356 U.S. 677 (1958) and *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959) . . . have been modified by the Supreme Court in *Dennis*" (D.B. 9/16/66, p. 17); and that the Supreme Court's action in this case plainly constitutes a rejection of *Socony-Vacuum* as the rule for this case" (D.B. 9/26/66). In its post-oral argument briefs, defendant argues that "*Dennis* overruled earlier decisions" [referring specifically to *Socony-Vacuum* and *Pittsburgh Plate Glass*]" (D.B. 10/28/66, p. 20-21); that "*Socony-Vacuum* . . . is 'dead' [except for a single sentence quoted in *Dennis*]" (D.B. 10/28/66, p. 21); that "the issuance of the Court's *Dennis* opinion reflects adoption by a unanimous Court of the minority opinion in *Pittsburgh Plate Glass*" (D.B. 10/28/66, p. 23); and that *Cox* v. *United States,* 8 Cir. 1960, 284 F. 2d 704, "to the extent, if any, that it implies that the trial court has discretion to deny disclosure of pertinent portions of grand jury transcript used by the prosecution for refreshment, it must be deemed in conflict with *Dennis* and *pro tanto* overruled" (D.B. 10/28/66, p. 24).

Appropriate recognition must, of course, be given *Dennis'* specific teaching in regard to the relative weight that should be given by federal trial judges to the competing policy considerations of secrecy and disclosure implicit in Rule 6 (e) of the Rules of Criminal Procedure. Appropriate recognition must also be given the broader and more general impetus that *Dennis* gives to the development of the concept that disclosure will ordinarily promote the proper administration of criminal justice in the courts of the United States. But recognition of those principles does not support defendant's basic argument that *Dennis* must be viewed as a "landmark" case in the sense that defendant argues. *Dennis* was not based on the Constitution. Nor did *Dennis* establish new principles or standards different from those long established by the earlier Supreme Court cases. *Dennis* applied existing standards to the particular factual situation presented by that case.

Our rejection of defendant's argument that *Dennis* rests upon constitutional grounds does not suggest that we reject the idea that the Supreme Court decisions that concern the application of rules of criminal procedure do sometimes, if not inevitably, carry constitutional overtones. Indeed, a lack of understanding or a gross misapplication of procedural rules, including the clear abuse of discretionary power conferred by them, calls into play familiar constitutional concepts of fair trial. Mr. Justice Brennan's comment on *Jencks'* discovery rationale in his concurring opinion in *Palermo* v. *United States,* 360 U.S. 343 at 362, says about as much as can be said generally on that subject. "It is true," Mr. Justice Brennan there said, "that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute."

But to say that the commands of the Constitution are close to the surface and that a sensitive ear can hear constitutional overtones is not to say that the light given the federal trial courts by *Dennis* in regard to how the Supreme Court now believes those courts should exercise their discretion in administering Rule 6 (e) of the Rules of Criminal Procedure is commanded by the Constitution of the United States. Nor is it to say that *Dennis'* acceleration of the development of broader disclosure practices and procedures in the administration of criminal justice in the courts of the United States is based on constitutional grounds. We therefore reject defendant's argument that *Dennis* is based on constitutional grounds.

IV. Factual Situation Presented in National Dairy.

Defendant National's motion for judgment of acquittal, notwithstanding the verdict and, in the alternative, for a new trial as to Counts One through Ten (File IX—1627-1633) did not in any way suggest that any error was committed in regard to those counts of the indictment in connection with the use of any portion of grand jury transcripts. Grand jury transcripts were not even mentioned in that motion directed to Counts One through Ten.

Defendant National's similar post-trial alternative motion for judgment of acquittal n.o.v. and for new trial as to Counts Eleven, Twelve and Thirteen (File IX—1634-1645) alleged in paragraphs 10 and 11 as follows:

> 10. The Court erred in overruling defendants' motions to be permitted to inspect those portions of the Grand Jury transcript used by the Government to refresh the recollection of witnesses Flanagan, Crimmins, Gilmore, Augenstein, Gardner, Baird and Stewart and to inspect those portions of such transcript which related to the same subject matters.
>
> 11. The Court and Government counsel made improper use of the Grand Jury transcript. (IX-1636).

That motion reflects that defendant National's trial com-

plaint was made in connection with only three counts of the indictment. And defendant's trial complaint in regard to those three counts was limited to the ground that the defense was not "permitted to inspect those portions of the Grand Jury transcript used by the Government *to refresh the recollection* of [seven particular] witnesses and to inspect those portions of such transcript which related to the same subject" and the complaint that "the court and Government counsel made improper use of the Grand Jury transcript" in that regard. (Emphasis ours).

No defense attempt was made at trial to show any "particularized need." Defendant simply insisted that it had a right to see the grand jury questions and answers that it heard read in open court under the supervision of the Court and to see portions of the grand jury transcript viewed by the trial judge in the course of its *in camera* examination conducted to prevent abuse of permitted refreshment use of the grand jury transcript.

Defendant did not attempt to show at trial, nor did it contend at trial that it had established any "particularized need" for any additional production, disclosure, or defense inspection of the grand jury transcript. In footnote 20 on page 22 of its October 28, 1966 brief, defendant concedes that we accurately noted in our post-trial opinion (231 F. Supp. at 667) that defendant had claimed at trial only an "absolute right" to examine. The Court of Appeals' accurate statement of the trial procedural posture of this case underlines defendant's reason why the defendant must now argue that *Dennis* holds that a defendant is entitled to claim the government's showing of "particularized need" as his own. The Court of Appeals stated:

> Counsel for National and Wise, apparently recognizing that grand jury minutes, under proper circumstances, may be used for the purpose of refreshing the

> recollection of witnesses, offered no objection to the procedure envisioned by the court. They did, however, move unsuccessfully for the privilege of examining the portions of the grand jury transcript which the Government intended to use. Neither does appellant, on this appeal, dispute that the Government was entitled to use the grand jury transcript for refreshment purposes. Rather, it contends that the court permitted Government counsel to use the grand jury testimony for impeachment purposes and as substantial evidence and, therefore, that the court erred in denying its motion to inspect the transcript. (350 F.2d at 330-331).

The Court of Appeals, we believe, correctly determined that:

> The record does not support the argument that the grand jury testimony was used for impeachment purposes or as substantial evidence and no objection of either nature was made during the trial. (350 F.2d at 331).

The Court of Appeals decided that, while it would have been justified in declining to consider defendant's assignment of error that the grand jury testimony had allegedly been used for impeachment purposes, it nevertheless considered that contention on the merits (350 F.2d at 331). In so doing it held that:

> Use of the grand jury testimony was limited to the stated purpose of refreshment, in strict conformity with the court's instructions. (350 F.2d at 331).

The Court of Appeals thus definitely held that *National Dairy*, on its facts, presented a question that related solely to the use of portions of grand jury transcript for refreshment purposes only. That court determined prior to *Dennis* that the record did not support any contention that the grand jury testimony was in fact used for impeachment

purposes. That court determined that defendant did not in fact object at trial to any alleged impeachment use of the grand jury testimony. So far as this Court is concerned, our re-examination of this case in light of *Dennis* requires that we note our agreement with the original findings and conclusions stated by the Court of Appeals. There was no prior occasion for this Court to make specific findings or state our conclusions on those questions because the defendant did not present the same argument to this Court that it later presented to the Court of Appeals. See 231 F. Supp. at 667.

The factual data upon which we base our findings concurring with those made by the Court of Appeals can be most conveniently stated by directing attention to the pages of the trial transcript that reflect the establishment and application of the refreshment procedure followed in the trial of *National Dairy*.

The question of how refreshment use of the grand jury transcript would be permitted first arose after we had determined that the government had made its first showing of "particularized need" for the refreshment of the recollection of witness Flanagan. During the discussion of that question defense counsel advised the Court that the defense wanted to be protected from the possible abuse that the government might select for refreshment use only "one excerpt from the [grand jury] record" that might not fairly reflect what "all excerpts in the [grand jury] record of this witness" might show (Tr. 426). Defense counsel stated:

> Certainly if the witness has said something that should be used to refresh his recollection, and I am sure he would be the first to want to have it, but the problem that I always have in this thing is, the Government decides what they are going to show him to refresh his recollection and I have never—I am never

> sure whether they are showing him one statement that may be qualified, modified or changed later on or not, and I think they have it within their power to represent to the Court that this is everything the witness said on the subject whether it appears in one place or fifteen places in the testimony. (Vol. 4, Tr. 426-427).

Counsel for the defense was willing to accept government counsel's representation in regard to what a particular witness had said on a particular subject "to save the Court the burden of going through the whole thing [to determine] this is all the man said on the subject" and agreed that "the Court ought to see it before I do" (Tr. 427). Defense counsel made clear that he eventually wanted to see the questions and answers that the government intended to use for refreshment purposes and also wanted to see the other portions of the grand jury testimony where the particular witness may have testified on the same subject that the Court would view *in camera* (Tr. 427).

Government counsel opposed the last step of the procedure suggested by the defense, pointing out that refreshment was the only use to which the disclosed grand jury testimony would be put, adding "it is not a question of using it for impeachment purposes, we do not purpose to do that" (Tr. 428).

We indicated our agreement with defense counsel's suggestion that a particular witness might unfairly be confronted with an inadvertent expression made in a particular question and answer; stating, for an example, the fixing of a particular date that might be reflected that would, within a matter of two or three later questions be identified as an error. We stated that all possibilities of such a mistake in the grand jury testimony must be explored and that "the real testimony must be developed by reading on

the four corners of the witness' testimony" (Tr. 434). We therefore required that the government, "in accordance with Mr. Chadwell's suggestion, designate all testimony before the grand jury relating to the subject matter on which counsel wish to refresh the witness' recollection" (Tr. 435).

In accordance with that established refreshment procedure, we directed that the government furnish the Court with a memorandum for each particular witness which designated all anticipated grand jury questions and answers to which the witness might have his attention directed for refreshment purposes, together with a citation to all other pages of the grand jury transcript where additional testimony may have been given on the same subject by the same witness.

Such memoranda were in fact and from time to time filed in connection with each of the refreshment witnesses as each was called to the stand. In each instance, and shortly before each particular refreshment witness testified, we read all of the pages of the grand jury testimony cited; determined *in camera* whether the questions proposed to be asked a particular witness were or were not, in our judgment fairly calculated to refresh the particular witness' recollection; and ruled in advance of the witness' direct or cross-examination whether the particular questions could or could not be asked for refreshment purposes. The various memoranda were entitled "Refreshment of recollection of [name of the particular witness]" and appear on pages 1194 to 1219 of File VIII of the trial court record.[6] The Court of Appeals stated on page 332 of 350 F. 2d that the defendant, as an appellant in that court, took the position on appeal that "not until perfection of this appeal did [it] learn that the 'citations' furnished to the court . . .

included a legal memorandum, and . . . material other than citations to the grand jury transcript." We believe this matter should be clarified.

It must be understood that the government did not file all the refreshment of recollection memoranda simultaneously. Each was filed immediately before a particular witness was put on the stand and it was mere happenstance that the Clerk filed all the memoranda consecutively in the same file. The government's legal memorandum entitled "Memorandum of the United States concerning the use of grand jury transcript to refresh the recollection of a witness" also happened to be filed by the Clerk immediately preceding the refreshment of recollection memoranda. That legal memorandum shows on its face that it was dated June 17, 1963. It was used by government counsel in the presentation of his argument at the conference held at the end of the day of June 17, 1963 when the refreshment question first arose (Tr. 432). The record shows that defense counsel had also prepared and used a similar legal memorandum on that subject to which he made reference in the course of that conference (Tr. 425; 438). We did not notice and do not now know whether government counsel served a copy of that legal memorandum on the defense. If they did not, they should have, even though the leading cases cited in that memorandum were fully discussed at the conference.

Counsel for the defense was not under any obligation to serve their brief on counsel for the government because defense counsel did not give a copy of their brief to the Court. As was noted in our opinion on the post-trial motions, defense counsel did not file any grand jury brief with this Court until March 11, 1964, months after the jury had returned its verdict. See 231 F. Supp. at 667.

On Tuesday morning, June 18, 1963, the trial day following the afternoon conference at which the refreshment procedure was established, we stated to counsel in chambers:

> Gentlemen, on the record, following our conference after we excused the jury yesterday, the Government furnished me the citations of the Grand Jury testimony concerning John Flanagan, both as to the material that the Government would desire to use for purposes of refreshment, and also marking all portions of the Grand Jury record where testimony was taken relating to the same topic, and also a notation of where Mr. Flanagan testified in entirety during the Grand Jury proceedings.
>
> I have reviewed the first two topics verbatim; I have scanned his full testimony. I am satisfied that the portions of the Grand Jury transcript marked in red, which the Government indicates they would use for the purposes of refreshment, is entirely consistent with all testimony given by Mr. Flanagan when he was examined about the same topic, and that the portions selected by the Government is that portion which most sharply gives the witness' testimony in the fewest number of questions and answers.
>
> As I indicated at the close of the day yesterday, I will permit the Government to use the transcript for purposes of refreshing Mr. Flanagan's recollection, but only for that purpose. I will make clear to the jury that the testimony given before the Grand Jury is not to be considered as affirmative evidence in this case, but that it is solely for the purpose of refreshment. (Vol. 5, Tr. 445-446).

Defense counsel, shortly after that statement, made the following oral motion:

> MR. CHADWELL: Your Honor, I move for the privilege of examining the portions of the transcript which Mr. Jinkinson has marked and submitted to Your Honor. (Tr. 447).

After being advised that we were going to experiment with the procedure; that we would get a bit of experience in connection with witness Flanagan; and that defense counsel should feel free to renew his request because the Court, either on his request or its own motion, would want to change the procedure if complete fairness was not being maintained to all parties, defense counsel stated:

> MR. CHADWELL: I just want to point out to Your Honor that, of course, I do not know what the transcript reveals, and if I did know, I think, would make it easier for me to handle any questions that might be asked or handle any cross-examination on this point. I do not know whether that will be necessary or not, of course, at this time. (Tr. 448).

Before Mr. Flanagan took the stand, we instructed the jury both as to the procedure being followed and of the law regarding refreshment of recollection. The following portions, omitting examples given, are illustrative of that explanation and instruction:

> Members of the jury, as I explained last night, we reached a question that might be a recurring question during the course of trial. The Court worked with counsel for both sides after you were excused and worked again this morning to establish the procedure under which a particular witness' recollection may be refreshed by having his attention directed to testimony that he gave at an earlier time before the grand jury that was considering the question of whether or not the charge should be made by way of indictment against the defendants in this case.
>
> I want to explain to you at this point what the law means by refreshing a witness' recollection. . . .
>
> The important thing for the jury to keep in mind is that whatever document may be used to refresh a witness' recollection, whether it is a telephone book,

whether it is a letter that he may have written, whether it is transcribed testimony before a grand jury, the particular document that is used for that purpose is not to be considered by you as affirmative evidence in this case. It is merely used for the purpose of refreshing the witness' recollection. The witness' recollection may be refreshed, and if it is, he will say so. . . .

The point that I want to underline is that regardless of what may be used for the purpose of refreshing a witness' recollection is not to be considered as affirmative evidence in this case, and that the evidence in that case that you shall consider is the testimony given by the witness on the stand.

Of course, if he says, "This does refresh my recollection, I remember giving that testimony, I remember that it was fresher in my mind at that time, and I do recall that I said that, and I know that I was telling the truth at the time, and I can now say that my recollection is refreshed and my present testimony is in accordance with that which I testified to earlier."

If he testifies that way, that is evidence in the case. If, on the other hand, he listens to the question and answers and says, "I am sorry, that doesn't help," then you are not to consider the questions and answers that he gave before the grand jury as evidence in this case. (Tr. 449-452).

How the procedure was followed is illustrated by its use with Mr. Flanagan. Page 453 of the trial transcript shows that government counsel, after having been advised of our ruling made after our *in camera* inspection, read a series of questions and answers from 1673-1674 of the grand jury transcript in an effort to refresh the recollection of witness Flanagan. That citation to the grand jury transcript had been given the Court at the bottom of the "Refreshment of Recollection of John Flanagan" memorandum under the heading "Material Desired for Refreshment." See File

VIII—1194. As had been stated of record (Tr. 445-446), we had already studied that portion of the grand jury transcript, together with the other references cited under the other heading "Other Material Relating to the Same Topic."

At the time the questions and answers were read to the witness we had before us the grand jury transcript and followed the reading of the questions and answers, word for word, in order to make certain that through inadvertence, the witness was not unfairly treated by an inaccurate reading. The pencil notation at the bottom of the Flanagan refreshment memorandum: "#6 p. 1628-1630—Banfield preparation of two price studies" was a note I added to reflect one additional citation given me orally during the noon hour by government counsel.

At the beginning of the afternoon session the following occurred out of the presence of the jury:

> THE COURT: I want to advise counsel for the defense that during the noon hour, counsel for the Government handed me a note designating Pages 1628 to 1630 in the same pattern as those directed this morning. I want to assure counsel that I have studied the grand jury transcript that appears on those pages, and will permit Government counsel to attempt to refresh this witness' recollection by the reading of those pages.
>
> I wanted to be sure that counsel understood that I had studied those and that was the purpose of coming here.
>
> MR. CHADWELL: I appreciate your comment, Your Honor. This is in addition to what the Government had shown you before Court opened this morning?
>
> THE COURT: That is correct.
>
> MR. CHADWELL: I want to renew our motion, Your Honor, and discuss it with the Court, but perhaps

it would be better to wait until counsel is finished with this witness, because for all I know, they have some other sections of the transcript to read to him and I have got something I wish to say to the Court with respect to all of them. (Vol. 6, Tr. 533).

When Mr. Flanagan left the stand, we stated:

THE COURT: Before the witness is excused, I would like to again direct the jury's attention to the fact that in connection with some six questions, various questions and answers from the Grand Jury testimony were read. I will again remind you at the end of the case that the questions and answers in the Grand Jury testimony were read for the purpose of attempting to refresh this witness' recollection. I repeat, that those questions and answers from the Grand Jury transcript are not to be considered as affirmative evidence against either defendant in this case.

You will recall when I give you the final charge, that I have spoken to you twice about this matter, and I will again call it to your attention at that time and I hope it will refresh your recollection as to how this procedure was followed and how it is to be treated by you. (Tr. 564).

On the following morning, the following occurred:

THE COURT: Mr. Chadwell, at the informal conference last night, we both recalled that you had reserved the right to make a motion for the record in regard to the grand jury transcript, and before we all forget it, I wanted to give you that opportunity this morning to make a motion for the record.

MR. CHADWELL: Thank you, Your Honor. I would like to move, and do move, for the right to inspect the grand jury transcript of the testimony of Mr. Flanagan, who testified yesterday with respect to all matters that were inquired into by Government counsel in the questions designed to attempt to refresh

his recollection, not only the questions and answers which were read to him but all other portions of the testimony relating to the subject matter thereof.

I want to make it clear I am not asking to go beyond the subject matter of the questions and answers which were actually read to the witness, but I felt that I was unable properly to evaluate his testimony in the absence of the complete transcript on those points.

THE COURT: Let the record show that the defense motion will be denied.

The record should also show that the Court read all of the testimony given in regard to a particular subject in regard to all of the questions and answers used for the purpose of refreshing witness Flanagan's recollection, and that I also checked word for word the Government's reading of the particular questions and answers during the course of Mr. Flanagan's examination. The reading was accurate, word for word.

On another matter the Government has submitted a similar list in regard to possible refreshment of the recollection of the witness Vincent Crimmins about 9:30 this morning, and between 9:30 and now, I have read all of that testimony, both marked in black and in red, as the procedure was outlined earlier in the record, so that it will not be necessary, when and if it becomes necessary to [refresh] and I take time to read it, but I want to assure counsel that I have read it and will again follow word by word any questions and answers that it might be necessary to read in connection with the refreshment of the witness, Vincent Crimmins.

MR. CHADWELL: May I make a statement to Your Honor?

THE COURT: Yes.

MR. CHADWELL: I have no doubt that Your Honor has done just that, and I appreciate that, but nevertheless we urge the motion with respect to the

grand jury transcript read to Mr. Flanagan and I now wish to move for the right to inspect the transcript of the witness, Mr. Crimmins, about which Your Honor has just spoken, and I would like to inspect not only what the Government will read to him but also other portions of the transcript dealing with the same subject matter, and the reason is not that I in any way doubt that the Court has inspected it and will watch to see that the questions are accurately read but in order that I may—or counsel for the Defendants may properly evaluate the transcript and the portions read to the witness, and be better able to cross-examine the witness on the testimony.

THE COURT: The Court will make the same ruling in connection with that motion. (Tr. 610-612).

As noted by the Court of Appeals, counsel for the defense "offered no objection to the procedure envisioned by the court" (350 F.2d at 331). The most defense counsel ever indicated they wanted was inspection of the questions and answers to be read and of the other portions of the grand jury transcript relating to the same subject matter that had been examined *in camera*. Counsel for the defense never spelled out with particularity why he felt it necessary that the defense inspect those portions of the grand jury testimony, except as quoted above. We find it obvious that the only purposes that could have been served would have been to enable the defense to express its view on the question of whether the defense believed the particular questions and answers in the grand jury transcript marked by the government would or would not, in the opinion of the defense, be likely to refresh the recollection of the particular witness and to enable the defense to comment on the question of whether the trial judge had correctly determined *in camera* that those questions and answers were

fairly chosen in light of all the witness' grand jury testimony on the particular subject.

One additional purpose would have been served—defense counsel would have been able to check whether the Court had in fact effectively checked whether government counsel correctly read the particular questions and answers that the Court permitted to be disclosed for refreshment purposes alone.

Defense counsel, of course, were aware of all the refreshment questions and answers actually disclosed and used because they heard them read in open court. When defense counsel renewed their motion to inspect on page 1004 of the transcript, for example, it was stated that "the defendants be permitted to inspect and examine and be aware of not only those marked by the government and to be read the witness, but those relating in any way to such portions." When any defense counsel indicated he had not heard clearly, the question or answer from the grand jury transcript was reread (Tr. 534); questions as to whether descriptive matter appeared in the grand jury transcript were promptly and accurately answered (Tr. 642); and, when required, we advised the witness of the context in which particular grand jury testimony was given (Tr. 826).

Our postmandate examination and detailed comparison of the record with the grand jury transcript used in connection with the examination of each of the seven refreshment witnesses shows that such a check was not necessary. That comparison shows that in each instance involved, the counsel for the government accurately read the grand jury questions and answers to each witness on every occasion that refreshment use was permitted.

While we made numerous determinations at trial of "particularized need" on motion of the government, our orders

of disclosure were limited to use for refreshment purposes only and were so ruled. Familiarity with *Socony-Vacuum, Pittsburgh Plate Glass* and the decision of the Eighth Circuit in *Cox* v. *United States* at the time of the conference relating to the establishment of the refreshment procedure is a matter of record (Tr. 432). In spite of the fact that the contemplated refreshment use of the grand jury transcript was precisely within the scope of *Socony-Vacuum,* we believed that the possibilities of abuse suggested by the defense were real and that appropriate regulation of the refreshment process was required by *Socony-Vacuum* and general considerations of fair trial. The safeguarding procedures above described were accordingly directed and followed and the jury was instructed throughout the trial and in our final charge that if a particular witness testified that his recollection had not been refreshed, the jury was not to consider the questions and answers read from the grand jury transcript as evidence in the case. We recognized at trial, as the Court of Appeals subsequently determined (350 F. 2d at 331), that the defense would have been prejudiced if the jury had been permitted to consider the grand jury testimony as substantive evidence. We believe that our repeated instructions in that regard fairly and adequately protected the defendants' interests. The Court of Appeals was of the same judgment. See 350 F. 2d at 331-332.

The citation by both the majority and dissenting opinions in *Pittsburgh Plate Glass Co.* (360 U.S. at 401 and 410, respectively), of *United States* v. *Spangelet,* 2nd Cir. 1958, 258 F. 2d 338, played its part in the trial of *National Dairy.* The safeguarding procedure described in Spangelet and other Second Circuit impeachment cases, although involving a different factual situation than that presented in *National Dairy,* nevertheless contained the seed for the *in*

camera examination part of the procedure designed and followed for refreshment use of the grand jury transcript in the trial of this case. The design of the refreshment procedure in *National Dairy* was also influenced by our knowledge of the procedure established for the National Deposition Program in the electrical antitrust litigation described in *Atlantic City Electric Company* v. *A. B. Chance Company,* (C.A. 2d Cir. 1963) 313 F. 2d 431 at 433, later to be cited with approval in *Dennis,* in footnote 15 on page 870 of 384 U.S.[7]

(End of Section IV)

V. Further Consideration of *National Dairy* In Light of *Dennis* Must Take Into Account The Factual Context of Each Case

Dennis, on its facts, involved an impeachment situation in which the trial court and the Court of Appeals had assumed, without either court making any examination of the grand jury minutes to ascertain the actual fact, that nothing in the grand jury testimony would be of impeaching significance in a case in which the probabilities were obviously to the contrary. *Dennis* emphasized that the particular factual situation of that case must be said to have established a "particularized need" within the meaning of well established and existing Supreme Court standards because (1) "there was reason to assay the [trial] testimony . . . against the much fresher testimony before the grand jury;" (2) because "the charge could not be proved on the basis of evidence exclusive of that here provided;" (3) because the testimony concerning "conversations and oral statements made in meetings . . . was largely uncorroborated" and the question of guilt or innocence could have turned on exactly what was said; (4) because the witnesses involved were in categories long suspect, such as accomplices, including a paid informer and one other wit-

ness had obvious reasons for hostility; and (5) because one of the witnesses admitted on cross-examination that he had been mistaken about significant dates (384 U.S. at 872-873).

Dennis held on those particular facts that "we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistences would have come to light if the grand jury testimony had been examined. There is no justification for relying on 'assumption'" (384 U.S. at 874). The focus of *Dennis,* as had been the earlier focus of *Procter & Gamble* and of *Pittsburgh Plate Glass,* was on an impeachment situation.

National Dairy, on its facts, involved a radically different factual situation; a refreshment, not an impeachment situation, was presented. In *National Dairy,* the grand jury transcript was ordered produced and, upon the government's several showings of "particularized need" in connection with seven particular witnesses, particular portions of the grand jury testimony was ordered disclosed solely for refreshment use. The government's showings of "particularized need" and motions for disclosure were so limited (Tr. 428).

At the time of the trial of *National Dairy,* the defense never so much as intimated that it desired or could, in fact, make any showing of "particularized need" of any sort, including a need for the impeachment of any of the seven refreshment witnesses. The defense asserted no claim that inconsistencies might exist between the grand jury and trial testimony of any of the seven witnesses involved. The only requests ever made by the defense were (1) that it be permitted to inspect the grand jury testimony that was in fact disclosed for refreshment purposes only, and (2) to see the other portions of the transcript that related to

the same subject matter that had been examined by the trial judge *in camera.*

Trial error was assigned in *National Dairy's* posttrial motion in connection with only three counts of the indictment; that alleged error was based solely on the ground that the defense had not been permitted inspection of the portions of the grand jury transcript just described. The defense did not contend at trial that *National Dairy* was an impeachment case or that anything except refreshment use was in fact permitted of the grand jury testimony.[8] Nor does the defense now make those contentions. Defense counsel made this clear at the postmandate oral argument. It was there denied that the defense had ever raised at trial or was now attempting to raise any point that "the Government was impeaching the seven witnesses" (O.A. Tr. 187). Defense counsel added that "we are basing our argument not on impeachment but on attempts made at refreshment. That was my whole argument. I didn't say anything about impeachment" (O.A. Tr. 188).

The considerations that relate to the initial production of documentary evidence in the government's possession, including grand jury transcripts; the purposes to be served by the required *in camera* examination by the trial judge; and, dependent upon the facts of each particular case, the reasons that require eventual disclosure to the defense in a case involving an impeachment situation are not automatically applicable to a case involving a refreshment situation. In a case involving potential impeachment, such as *Dennis,* every consideration of fairness requires and dictates that all possible doors to truth be unlocked and that all available data in the government's possession in which inconsistencies may exist in fact be produced, first, for *in camera* inspection by the trial judge and finally that such

data be disclosed to the defense, assuming that inconsistencies do in fact exist, for impeachment use by it. The principles and standards established and recognized by the earlier Supreme Court cases applied in *Dennis* make certain that such must be the rule unless clear and compelling considerations oppose such production and eventual disclosure to the defense of impeachment data in the government's possession.

The Supreme Court has long made it obvious that in an impeachment situation the defense, and not the trial judge, should decide what the defense, subject to the usual rules of evidence, should use in its impeachment effort. *Dennis* obviously does not command that the trial judge in *National Dairy* should have in effect become co-counsel for the defense. Neither *Dennis* nor any other case or authority with which we are familiar has ever held or suggested that a federal trial judge is under duty, the violation of which is reversible error, to order defense counsel to file a motion requesting that the trial judge conduct an *in camera* inspection to determine whether inconsistencies exist between a witness' trial and grand jury testimony. Indeed, we believe it would have been improper for us to have inquired at the trial of *National Dairy* whether defense counsel had considered filing some motion that we might have filed had we been defense counsel instead of the judge in the case. As the Court of Appeals noted, both sides were represented by "highly competent and skilled advocates" and "this prosecution has produced a history of every conceivable motion and legal memoranda" (350 F. 2d at 338). The fundamental principle underlying *Dennis'* suggestion that "in our adversary system, it is enough for judges to judge" (384 U.S. at 875) is directly applicable.

Nor does *Dennis* suggest, indeed, it negates, the notion that disclosure for disclosure's sake is a new and automatic

rule to be followed by federal trial judges and that such things as the filing of appropriate motions, the showing of particularized need, and compliance with all aspects of the approved and established trial procedures that relate to impeachment are things of the past.

Gordon v. *United States*, 344 U.S. 414 (1953), emphasized long before *Jencks* or *Dennis* that concepts of fairness require the production of documentary evidence in the government's possession that might be useful "*to impeach* the testimony of a prosecution witness" (344 U.S. at 415, emphasis ours). In spite of all the temporary uproar caused by *Jencks*, that case extended but slightly the holding of *Gordon*. *Jencks*, like *Gordon*, was focused on an impeachment factual situation. *Jencks*, like *Gordon* before it and *Dennis* after it, recognized that after production permits a case for disclosure to be made, the defense is then, but only then, entitled to inspect and to use as it sees fit. *Jencks* held that "the petitioner is entitled to inspect the reports to decide whether to use them in his defense" because "only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witnesses and thereby furthering the accused's defense" (353 U.S. at 668-669).

The question of policy that relates to the production of impeachment documents in the possession of the government for eventual use by the defense presented by *Pittsburgh Plate Glass* was infinitely more complicated than that presented in *Gordon* and *Jencks;* the particular document involved in *Pittsburgh Plate Glass* was a grand jury transcript. In that case the Supreme Court was required to determine the additional question of whether the long established policy of secrecy for grand jury transcripts was to be denied the weight that black letter law had given to

it. It is significant that all members of the Supreme Court in *Pittsburgh Plate Glass* were in agreement that grand jury transcripts must be treated specially and that something more than the ordinary policy considerations of secrecy versus disclosure must be considered when a grand jury transcript is the particular document that the defense wants produced for its ultimate examination and use for impeachment purposes.

Both the majority and minority opinions in *Pittsburgh Plate Glass* were agreed that neither *Jencks* not the Jencks Act were applicable to a grand jury transcript. See 360 U.S. at 398 and 403. Nor did the disagreement between the majority and minority in *Pittsburgh Plate Glass* relate to what principle should be applied to grand jury transcripts. The conflict in view centered primarily on whether, on the particular facts there involved, the defense had in fact sustained its burden of showing a particularized need for disclosure for impeachment use. The dissent's view of the facts was that only "lip service" had been paid principles long established by *Socony-Vacuum* and *Procter & Gamble.* The dissent was convinced that under the facts presented in *Pittsburgh Plate Glass,* the defense had not been "permitted every reasonable opportunity to impeach a government witness" and that "obviously the impeachment of the Government's key witness on the basis of prior inconsistent or contradictory statements made under oath before a grand jury would have an important effect on a trial" (360 U.S. at 407).

The focus of *Dennis,* like the focus of *Gordon, Jencks, Procter & Gamble* and *Pittsburgh Glass* before it, was directed to particular factual situations in which production and later defense inspection was sought for impeachment purposes. *Dennis* applied and discussed exactly the

same standards and principles that were established and applied in the earlier Supreme Court cases. *Dennis* simply determined that under the facts there presented "it cannot fairly be said that the defense has failed to make out a 'particularized need' " (384 U.S. at 872). *Dennis* in no way held that motions for production or showings of "particularized need" are no longer required. *Dennis* recognized an established principle when it suggested that it is defense counsel's job—not the trial judge's job— "to pick out all of the grand jury testimony that would be useful in impeaching a witness". (384 U.S. at 874). *Dennis* could do no more than recognize that principle because at trial the impeachment procedure did not reach a point where that question could be presented. In *Dennis* the trial judge failed at the outset of the impeachment procedure to properly perform his duty either to order production of the grand jury transcript or to make an *in camera* examination of that transcript in order to determine whether impeachment data in fact existed. The trial judge in *Dennis* did not err in refusing to permit defense examination or defense use; he erred in refusing even to order production.

Dennis did not suggest that it was overruling any earlier Supreme Court case. Nor did *Dennis* even intimate that it intended to eliminate judicial supervision of the established trial procedures that have long regulated the production and subsequent disclosure of grand jury transcripts for impeachment use. *Dennis* did not purport to ban *in camera* examinations by the trial judge. The established Second Circuit *in camera* examination impeachment procedure, first noted by the Supreme Court in both opinions in *Pittsburgh Plate Glass* by their respective citation of *United States* v. *Spangelet*, 258 F. 2d 338 (360 U.S. at 399 and 401) was again noted in *Dennis*. *Dennis* stated with approval that the *in camera* examination feature of that impeach-

ment procedure "may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony" (384 U.S. at 874).[9]

The leading Second Circuit case of *United States* v. *Spangelet* makes clear that the defense does not have an automatic right to examine a grand jury transcript, even in an impeachment situation. *Spangelet,* describing the Second Circuit impeachment procedure, noted that "the district judge properly inspected *in camera* the grand jury minutes of Gaudin's testimony to see whether it conflicted with the testimony given at the trial" (258 F. 2d at 341). It then held:

> And if no inconsistency had been shown, we agree that the proper procedure would have been that actually taken, namely, to deny the defendent access to the minutes and to order a copy thereof to be sealed and incorporated into the trial record for availability on appeal. (258 F. 2d at 341).

The Second Circuit in *Spangelet* reversed the trial judge because he had failed properly to determine that inconsistencies in fact existed.

United States v. *Giampa,* 2 Cir. 1961, 290 F. 2d 83, cited by *Dennis* in footnote 21 on page 874 of 384 U.S., illustrates the factual situation case in which the Court of Appeals agreed with the trial judge's determination that no inconsistencies in fact existed. The defense, under that factual situation, was not deprived of any right to examine the grand jury transcript because no such right, under those facts, exists. The conviction was therefore affirmed because the defense obviously could not have been prejudiced by being denied an examination of a grand jury transcript that, in fact, could not have been used for impeachment purposes because no inconsistencies in fact existed between the particular witness' trial and grand jury testimony.

Dennis' citation of *Giampa* directed specific attention to the following significant language on page 85 of that opinion:

> To avoid uncertainty in the future upon trials wherein this problem arises, certain fundamental principles should be observed. If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes *and if inconsistencies be found should make such portions of the minutes available to defense counsel.* (290 F. 2d at 85, emphasis ours).

United States v. *Hernandez,* 2 Cir. 1961, 290 F. 2d 86, also cited in *Dennis'* footnote 21, presented, on its facts, the identical situation later presented in *Dennis.* Indeed, *Hernandez* anticipated *Dennis,* both in theory and in result, by six years. In *Hernandez,* as later in *Dennis,* the trial judge simply refused to order production of the grand jury transcript. And, as later was the case in *Dennis,* the trial judge also refused to conduct an *in camera* examination. *Hernandez,* applying the principles of *Spangelet* and citing the intervening Second Circuit cases of *United States* v. *Zborowski,* 2 Cir. 1959, 271 F. 2d 661, and *United States* v. *McKeever,* 2 Cir. 1959, 271 F. 2d 669, all of which cases were but applications of the principles established by the earlier Supreme Court cases subsequently applied in *Dennis,* held that it was "incumbent upon the trial court to inspect the minutes, as requested by the defendant, in order to ascertain whether any material inconsistencies existed" and that "its failure to do so requires that the conviction be reversed" (282 F. 2d at 72).

The established Second Circuit impeachment procedure approved in *Dennis* has long recognized, consistent with the Supreme Court cases upon which it is based, that the defense has no absolute or automatic right to inspect a grand jury transcript even when use is sought for impeachment purposes. The defense, under the approved impeachment procedure, is entitled to examine and, still later, to use for impeachment if and when, but only if and when, the trial judge determines as a result of his *in camera* inspection that inconsistencies in fact exist between trial and grand jury testimony that could be used for impeachment of the particular witnesses involved.

Dennis' citation: "Cf. Fed. Rule Crim. Proc. 16 (e), as amended in 1966; 18 U.S.C. § 3500 (c)," (384 U.S. at 875), is one of the most significant citations in that opinion. The Supreme Court there directed attention to the established trial and appellate procedures of the Jencks Act which covers the production of all documents in the government's possession except grand jury transcripts. *Dennis'* compare citation to new Rule 16 (e) makes clear that the effect of that new rule is to require that the principles codified in the Jencks Act almost ten years ago now be followed in connection with a defendant's grand jury testimony now producible under new Rule 16 (a)(3).[10]

This is not to suggest, however, that *Pittsburgh Plate Glass* was silently or in any other way overruled by *Dennis*. *Dennis* did not suggest, nor was it required to hold, that the Jencks Act now must be said to cover grand jury transcripts. The impeachment procedure approved in *Dennis* was established by the Second Circuit's application, on a case by case basis, of principles long established by the Supreme Court cases dealing with grand jury transcripts, including but not limited to *Pittsburgh Plate Glass*. *Dennis* applied those same principles to a factual situation compa-

rable to *Hernandez* and reached exactly the same result as had been reached by the Second Circuit six years earlier.

Dennis recognized and approved the Second Circuit impeachment procedure in regard to the entire grand jury transcript that is now, for all practical purposes, codified in new Rule 16 (e) as that rule relates to the "recorded testimony of the defendant before a grand jury," as provided in Rule 16 (a)(3). *Dennis* also recognized that such procedure is quite comparable to the now familiar trial and appellate procedures of the Jencks Act. Those comparable procedures, consistent with all earlier Supreme Court decisions and with *Dennis,* recognize that the burden of showing a "particularized need" rests on the movant who would have a grand jury transcript produced for his examination.

Consistent with every Supreme Court case on the subject, *Dennis* recognized that the defense does not have a substantive right to inspect a grand jury transcript under any and all factual circumstances. The dissent in *Pittsburgh Plate Glass,* upon which the defendant so heavily relies in its postmandate argument, suggested that the ideal impeachment procedure to be followed by the trial judge would provide that *"when he [the trial judge] has satisfied himself* what part of the grand jury testimony covers the subject matter of the witness' testimony on the trial, . . . he [should then give] . . . that part to the defense" in order that "the defense may utilize the grand jury testimony *for impeachment purposes* as it may deem advisable in its best interests, subject, of course, to the applicable rules of evidence" (360 U.S. at 410, emphasis ours). The majority in *Pittsburgh Plate Glass* did not reach that question. The rationale of the majority opinion was entirely consistent with the dissent's suggestion (both opinions directed attention to *Spangelet*), again illustrating the fact that differences of opinion in the earlier Supreme Court opinions

reflected disagreements over factual application of principles about which there was no real dispute.

Dennis, consistent with the fundamental rationale of all the earlier Supreme Court cases, recognized that if the trial judge in fact orders the grand jury transcript produced and if the trial judge in fact properly makes his required *in camera* examination for inconsistencies and properly finds none, his refusal then to permit inspection of the grand jury transcript by the defense is also proper. A defendant, of course, has the right to test on appeal the question of whether the trial court's judgment on what is essentially a factual question in regard to the existence or nonexistence of inconsistencies was right or wrong. Concepts of fairness and justice require no more. If the appellate court agrees that no inconsistencies in fact existed, the conviction would be affirmed; if the appellate court does not agree with the trial court's factual *in camera* appraisal of the trial and grand jury testimony, the case would be reversed and remanded.

The impeachment procedure approved by *Dennis* makes provision for the sort of "appropriate judicial safeguards" recommended by the strongest of advocates for expanded criminal discovery. See Brennan, Remarks on Discovery, 33 F.R.D. 56 at 65, cited in the Notes of Advisory Committee on Rules, to support Rule 16 (e). Mr. Justice Brennan there advocated that "I would leave the primary responsibility with the trial judge under such guidance from appellate courts as may be necessary to mark its proper limits."

Dennis expressly reaffirmed the established principle of all the earlier Supreme Court grand jury transcript cases that it is "the trial judge's function [to decide] whether a case has been made for production, and to supervise the process" (384 U.S. at 874). If we should read and apply

Dennis as broadly as the defendant suggests we would miss the mark as far as *United States* v. *Rosenberg*, 3 Cir. 1957, 245 F. 2d 870, missed when it applied *Jencks* to grand jury minutes. The Supreme Court accurately described the Congressional reaction to that Third Circuit decision in the course of deciding *Pittsburgh Plate Glass Co.*[11] Acceptance of defendant's argument that *Dennis* established that a defendant has a constitutional right to make a general inspection of a grand jury transcript without any showing of particularized need within the meaning of all the Supreme Court decisions and without any prior judicial supervision—a right much broader than any right recognized or established by *Jencks* and the Jencks Act—would, in our judgment, produce a reaction that would make that produced by *Rosenberg* seem mild. We reject defendant's argument that *Dennis* holds that a defendant has an automatic right to have a grand jury transcript produced for defense examination if and when the government makes any use of that document; a right that clearly does not exist in regard to any other document in the government's possession.

Dennis' comment that "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact" and its comment that "exceptions to this are justifiable only by the clearest and most compelling considerations" (384 U.S. at 873) must be read in context. Defendant's arguments attempt to push those comments into statements of constitutional axioms.

The state of the record forces the defendant to recognize that at trial the defense did not make any showing of particularized need. Defendant is therefore forced to base its postmandate argument upon its newest notion that *Dennis* somehow relieved the defense of all burden of showing any

"particularized need." Defendant argues that *Dennis* commands that once the government made its showing of "particularized need" for refreshment, that *same* showing had the automatic effect of requiring inspection by the defense of the entire grand jury transcript. And all this without motions seeking such relief being filed. Defendant argues that *Dennis* commands that any government use of the grand jury transcript converted the entire grand jury transcript into the same status that pretrial depositions occupy in a civil case. Anything less, defendants argue, would deny the defense its alleged constitutional right of access to a "storehouse of relevant fact" (384 U.S. 873).

Dennis did not overrule the principle stated in *Gordon* v. *United States,* 344 U.S. at 419, that forbids a "broad or blind fishing expedition among documents possessed by the Government on the chance something impeaching might turn up"—a principle which *Jencks* said "we reaffirm and re-emphasize" (353 U.S. at 667). *Dennis* did not establish a new rule that there shall be discovery for the sake of discovery. Nor did *Dennis* even intimate that the price that the Government must pay for using grand jury transcripts in an attempt to refresh the recollection of a single witness is delivery of the entire grand jury transcript to the defense for its inspection. *Dennis* did not eliminate the established requirement that a movant, including a defendant, has the burden of demonstrating his own "particularized need" for production of the grand jury transcript in order that the trial judge may make an appropriate ruling as to whether portions should or should not be ordered disclosed under Rule 6 (e) of the Rules of Criminal Procedure.

Defendant's extended argument that the factual situation in *National Dairy* is in fact similar to that presented in *Dennis* is based on the untenable theory that an impeachment and not a refreshment situation was involved in

National Dairy. It is also based on the erroneous assumption that the defense in *National Dairy* was in fact denied the same motions for production and for *in camera* examination that were in fact filed and denied in *Dennis*. But even if defendant's assumptions could be considered to be valid, the record establishes that *National Dairy* presented on its facts an entirely different factual situation than that presented by the facts of *Dennis*. There was never any reason to assay the prior grand jury testimony of any *National Dairy* witness. No one ever suggested at trial nor does the defendant now suggest that any *National Dairy* witness' trial testimony was or might be inconsistent with his grand jury testimony.[12] The defendant has never intimated that there was or now is any reason even to suspect that inconsistencies might exist.

Our postmandate study of all the trial and all the grand jury testimony of all the witnesses involved establishes that such a suspicion would have been unfounded. In order to remove any conjecture and speculation about that question we find as a fact that no inconsistencies in fact exist in the trial and grand jury testimony of the *National Dairy* witnesses.

National Dairy was not a case where the charge could not be proved on the basis of evidence exclusive of the testimony given by the refreshment witnesses involved. The guilt or innocence of the defendants did not turn on the testimony of those witnesses. The testimony of those witnesses was corroborated by numerous other witnesses and by voluminous documentary evidence. If the testimony of the refreshment witnesses had been disregarded entirely on a motion to set the verdict aside on the ground of insufficiency of the other evidence, a fair appraisal of the record would have required that such a motion be promptly denied. We so find. No *National Dairy* witness made any

admissions at trial that suggested to anyone that he may have testified inconsistently before the grand jury. Nor were the refreshment witnesses hostile to the defense. Indeed, it was obvious that each of the refreshment witnesses were reluctant to say anything that they believed would materially aid the prosecution. We so find those facts.

The fact *National Dairy* and *Dennis* are clearly distinguishable on their respective facts is not of paramount importance in this case. Acceptance of the defendant's invitation to debate that question involves an initial acceptance of defendant's basic contention that the principles applicable to impeachment and refreshment are identical and that the principles that regulate a proper refreshment procedure established in *Socony-Vacuum* must be considered to be "dead" in light of *Dennis'* discussion of the principles applicable to a proper impeachment procedure. We refuse to accept defendant's invitation because we believe that defendant's report of *Socony-Vacuum's* death is, in words attributed to Mark Twain, "grossly exaggerated," A. B. Paine, Mark Twain, a Biography, Vol. II, p. 1039 (Harper's 1912). We turn now to that question.

VI. Rejection of Defendant's Basic Argument In Regard to the Alleged Impact of *Dennis* on *Socony-Vacuum*

Defendant's basic argument, as it must, recognizes that both this Court and the Court of Appeals held that the principles established in *Socony-Vacuum* were properly applied in the trial of *National Dairy*. Defendant attempts to escape the force of those facts by contending that since *Dennis, Socony-Vacuum* is "dead" (D.B. 10/28/66, p. 21). Defendant attempts to argue that the Supreme Court's remand of *National Dairy* for "reconsideration in light of

Dennis plainly constitutes a rejection of *Socony-Vacuum* as the rule for this case" (D.B. 9/26/66, p. 10).

We reject defendant's basic argument in regard to *Socony-Vacuum*. If the Supreme Court intended to overrule *Socony-Vacuum* in *Dennis* it would have expressly said so. There was no occasion for *Dennis* to do anything except cite *Socony-Vacuum* with approval because the principles there applied and those applied in *Dennis* are entirely consistent; the two cases, on their respective facts, simply applied different facets of consistent principle to entirely different factual situations.

Socony-Vacuum, on its particular facts, involved a case in which the trial judge had in fact ordered production and permitted the use of prior grand jury testimony for refreshment purposes alone. The defense was not permitted to examine the grand jury transcript at any time. *Socony-Vacuum* determined that "no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness" (310 U.S. at 233). That case directed that federal trial judges design and follow "some appropriate procedure" to prevent the improper refreshment use of the produced grand jury transcript (310 U.S. at 233). *Socony-Vacuum* reversed a Court of Appeals' determination that "the trial court committed prejudicial error in refusing to permit defense counsel to inspect the transcript of grand jury testimony used to refresh the recollection of certain witnesses" (310 U.S. at 231). It expressly held that "refusal to make [a grand jury transcript used solely for refreshment purposes] available to counsel for the defense [cannot be said to be] *per se* reversible error" (310 U.S. at 234).

The factual circumstances presented in *National Dairy* were substantially the same as those presented in *Socony-*

Vacuum. The particular witnesses involved in *National Dairy* were either employees and officers of the defendant or were closely associated with the defendant; four of the seven *National Dairy* refreshment witnesses fell in this category. The remaining three *National Dairy* refreshment witnesses were officials of co-conspirators named in the indictment whose companies, along with the defendant National, are named in the numerous civil antitrust treble damage actions that still pend in this Court. The witnesses in *National Dairy* whose recollections the government sought to refresh were, as in *Socony-Vacuum,* hostile to the government's case, and were evasive and reluctant to testify. The testimony of those witnesses, together with the testimony of other witnesses similarly situated, formed the factual basis upon which defendant presented its various factual defenses to the jury. All those facts, as in *Socony-Vacuum,* were apparent to every one in the courtroom during the trial and clearly appear from a reading of the entire testimony of the seven *National Dairy* refreshment witnesses involved. We so find.

In *National Dairy,* as in *Socony-Vacuum,* the grand jury testimony was used for refreshment purposes only; in many instances, the refreshment incident ended by the witness merely saying that his recollection had not been refreshed. Appropriate safeguarding procedures were established and followed in both cases. The jury was repeatedly instructed in *National Dairy* that it could not consider the grand jury testimony as substantive evidence. We find that the trial testimony, refreshed or otherwise, and the prior grand jury testimony of each of the particular *National Dairy* refreshment witnesses was, in any event, either cumulative or dealt only with the minutiae of the conspiracy. We further find that the evidence in *National Dairy,* minus the testimony of the refreshment witnesses,

clearly established all the facts necessary for proof of the conspiracy. We also find that the evidence of defendant's guilt in *National Dairy* did not in any way hang on any delicate balance, even if all such testimony be deleted in its entirety.

The purpose of providing for an *in camera* examination of the *National Dairy* grand jury transcript was to enable the trial judge to rule the only two questions involved on the basis of the particular facts presented in regard to each particular witness. In order to prevent any possible abuse of the refreshment procedure, the trial judge was under duty to determine (a) whether particular grand jury questions and answers could fairly be said to be calculated to refresh a particular witness' recollection and (b) whether such questions were fairly selected in the full context of the particular witness' grand jury testimony on the particular subject of desired refreshment. The determination of those questions called for the exercise of judicial power and discretion; it did not involve the exercise of judgment on the part of defense counsel.

As a matter of sound general policy, trial judges seek and welcome the views of counsel for both sides before ruling on either preliminary questions of fact or on questions of law that are within the exclusive province of the trial judge. Defense counsel did not suggest at the time of the trial of *National Dairy* how their views on either of the two questions that we were required to decide *in camera* could be helpful in assisting us in the discharge of our judicial duties to be performed *in camera* under the safeguarding procedures that had been established without defense objection. The Court of Appeals correctly determined that the defense "offered no objection to the procedure envisioned by the court," 350 F. 2d at 331. We believe that it can fairly be said that defense counsel recognized that the

trial judge's determination of such questions would be based on not uncomplicated assumptions of how the human mind works — assumptions that are not the subject of logical demonstration — and that presentation of argument would not, as a practical matter, be helpful to either the trial judge or to the defense. Cf. III Wigmore, § 755, page 100 (3rd Ed. 1940).

The rulings that we made *in camera* nevertheless were made on the assumption that the defense would contend that no set of grand jury questions and answers would in fact be calculated to refresh the recollection of any of the particular refreshment witnesses. We anticipated that such necessarily would be the defense position because it was and is obvious that the defense did not want the recollections of any of the seven refreshment witnesses refreshed on any subject that the government believed would aid the prosecution. It was and is equally obvious that the government would not seek refreshment on any subject it believed to be beneficial to the defense.

Counsel for the defense did not once object that we had erroneously permitted the use of a grand jury question and answer that was not fairly calculated to refresh the recollection of a particular witness. Had defendant believed that we had improperly permitted the use of any particular portion of the grand jury transcript in that regard we are certain that some objection would have been voiced at trial. No objection was made at trial on that score nor has any been made on that score since trial.

Objection at trial, of course, was not possible in regard to whether we had fairly determined that the questions and answers used in the courtroom were in fact fairly selected in light of the full context of the particular witness' grand

jury testimony. But that fact does not mean that the defense was denied a fair trial.

We were convinced at the time of trial — and further consideration of this case in light of *Dennis* has not changed our mind — that all trial rulings made in connection with all trial *in camera* examinations of the grand jury transcript were subject to appellate review, so that the defendant would be ultimately protected against any prejudice that may have resulted from any of our rulings on the two questions presented for our determination in the refreshment procedure.

Our postmandate review of our trial rulings on both questions, which included re-examination of the grand jury and trial testimony of every witness involved, convinces us that those rulings were fair and proper and that the defendant has no just claim that it suffered any prejudice by any of those rulings. We so find.

The question of whether we would handle a similar refreshment problem involving some future grand jury transcript in exactly the same way is not relevant to the question of whether the defendant in *National Dairy* was prejudiced in fact and law by the refreshment procedure followed in the trial of that case. Judges and lawyers not infrequently make their best rulings and finest arguments on their respective walks home from the courthouse immediately after the completion of the trial of a particular case. As a quite practical matter, it is improbable that either this or any other federal trial judge will be faced with precisely the same problem, at least in the form presented in the *National Dairy* trial. Under the new Rules of Criminal Procedure, as amended 1966, a federal trial judge now clearly has power to order production of all documentary evidence in the possession of the government at a pretrial

conference. As a part of the pretrial proceedings, the trial judge may make an *in camera* inspection of the grand jury transcript. The judicial determination of whether disclosure and defense examination should be ordered can then be made under circumstances where the practical trial pressure of keeping a jury in the box week after week will not be a factor militating against the design of further appropriate pretrial procedures under which the granting of inspection by the defense of all the produced refreshment data, including but not confined to the grand jury transcript, could be properly provided. We see no reason why motions alleging "particularized need" should not be set down for preliminary pretrial hearing under procedures not dissimilar to familiar Rue 41 (e) motions.

This Court and the Court of Appeals followed and applied the principles of *Socony-Vacuum* to the trial of *National Dairy*. The Court of Appeals has determined that "no judicial abuse of discretion has been demonstrated," holding that:

> The inspection of grand jury minutes and the use of grand jury testimony have been permitted for the purpose of refreshing witnesses' recollections. *United States* v. *Socony-Vacuum Oil Co., supra,* (in which there were ninety instances when the Government used grand jury testimony to refresh recollection of witnesses); *Cox* v. *United States,* 284 F. 2d 704, 706 (8 Cir. 1960). No iron-clad rule requires that counsel for the defense be shown the grand jury transcript where, as here, it is not shown to the witnesses and where, as here, an appropriate procedure is adopted and followed to prevent its improper use. *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 233, 60 S. Ct. 811. In the final analysis, the question whether disclosure should be permitted is one addressed to the sound discretion of the trial court. Rule 6 (e) F.R. Cr. P.; *Pittsburgh Plate Glass Co.* v. *United*

States, supra, 360 U.S. at 399, 79 S. Ct. 1237. (350 F. 2d at 331).

We note our agreement and determine independently that defendant's contention that *Dennis'* light requires this Court to hold that Socony-Vacuum is "dead" is not tenable. It follows that no *per se* reversible error can be said to have been committed in this case. See *Socony-Vacuum,* 310 U.S. at 234. We further find and determine that the principles approved in *Socony-Vacuum* and all other Supreme Court cases dealing with grand jury transcripts, including *Dennis,* were properly applied to the facts presented in the trial of *National Dairy,* so that it can not be said that any error of any kind was committed in the trial of *National Dairy* in regard to the permitted use of the grand jury transcript for refreshment purposes.

An analogous application of the principles established in *Rosenberg* v. *United States,* 360 U.S. 367, would be required if it be assumed *arguendo* that some sort of error was committed by our refusal to permit the defense to inspect the particular portions of the grand jury transcript requested by it at trial. Both majority and dissenting opinions in *Rosenberg* agreed that failure to deliver a particular statement properly producible under the Jencks Act was harmless within the meaning of Rule 52(a) in a factual context in which a copy of that document in a different form had in fact been delivered the defense. The majority held "no relevant purpose could have been served by giving petitioner's counsel a typewritten copy of a document which he had already been given in its original form, no advantage to the petitioner was denied by withholding it" (360 U.S. at 370). Mr. Justice Brennan, for the dissent, agreed that the harmless error doctrine was applicable to Jencks Act failures to produce; the dissent did not agree that the doctrine should be invoked in regard to all of the docu-

ments involved in that case. In regard to the failure to produce the document just mentioned, the dissent made clear its view that such failure was obviously a violation of the Jencks Act but that such failure could not be considered reversible error under Rule 52 of the Rules of Criminal Procedure. The dissent stated:

> The defense was not given a typed statement signed by Meierdiercks which was discoverable under the statute, but this was harmless error since the defense was given a handwritten statement from which the typed statement had been copied. (360 U.S. at 377).

Cf. *Palermo* v. *United States,* 360 U.S. 343 at 364 (opinion concurring in result). See also and compare *United States* v. *LaRocca,* W.D. Mo. 1963, 219 F. Supp. 53, affirmed 8 Cir. 1963, 337 F. 2d 39, in which we had occasion on ruling a motion for new trial to give further consideration to the Jencks Act question there involved in light of the second *Campbell* v. *United States,* 373 U.S.4 487, decided shortly after *LaRocca* had been tried.

Appropriate appellate review of our trial court rulings made in connection with our supervision of the refreshment procedure, assuming that the defendant properly preserved some appropriate appellate position, can not be made unless we follow the substance of the procedure now provided in Rule 16(e) of the Rules of Criminal Procedure. Our ruling denying defendant's motion to inspect the portions of the grand jury transcript that we examined *in camera* was certainly the equivalent of an order granting a protective order under that new Rule. We also believe the appellate procedure provided in Section 3500 (c) of the Jencks Act is comparable. The spirit of *Dennis,* of 18 U.S.C.A. § 3500 (c), of new Rule 16 (e), and considerations of fairness and common sense, require that we seal and preserve in the record the appropriate parts of the grand

jury transcript considered by this Court in the trial of *National Dairy* so that they will be available to the appropriate appellate court.

When we made inquiry concerning this matter at oral argument (O.A. Tr. 100-112, 115) the government indicated that it believed, subject to the Court's view, that the grand jury transcript should be made a part of the record (O.A. Tr. 117). Defendant's stated position was that it did not believe that making the appropriate portions of grand jury transcript part of the record would serve any useful purpose because the defendant insisted that it was entitled to a new trial as a matter of right without any showing of prejudice (D. Memo. 11/9/66, p. 3).

Some question arose at oral argument in regard to the past and present location of the grand jury transcript (O.A. 100-112, 115). They were eventually located in the Department of Justice's files in Chicago and, at our request, forwarded to this Court pursuant to the government's letter of November 11, 1966, copies of which were sent defense counsel. Because defendant, in specific response to our inquiry, has taken the firm position that it is entitled to a new trial without any showing of prejudice and because it has stated that so far as its theoretical position is concerned, no useful purpose would be served by an examination of the grand jury transcript, our order will not provide for disclosure of the grand jury transcript to the defense pending appeal. Any occasion for further examination by either side will depend largely upon the next position the defendant may take in regard to the grand jury testimony. If defendant presents the same postmandate arguments on appeal that it has presented to this Court, the defendant would have no reason for wanting to make any examination of the grand jury transcripts.

Except for defendant's response to our specific inquiry, we would have ordered limited disclosure of the grand jury transcripts for examination by defense counsel for use on appeal. Under the circumstances, however, we leave the question of disclosure to the discretion of the appropriate appellate court.

ORDER

This Court, pursuant to the mandate of the Supreme Court, has given further consideration to this case in light of *Dennis* v. *United States*. For the reasons stated in this memorandum opinion and in accordance with the findings of fact and conclusions of law herein stated, all of which are incorporated in this order by this reference, it is

ORDERED that defendant's postmandate motion for an order granting a new trial should be and is hereby denied. It is

FURTHER ORDERED that the grand jury testimony of the witnesses listed in the government's letter to this Court of November 11, 1966 be sealed and made a part of the record of this case for transmittal to the appropriate appellate court in the event of further appellate proceedings in this case. The government's November 11, 1966 letter shall be attached to the box containing the grand jury transcripts for identification purposes. It is

FURTHER ORDERED that disclosure of the sealed grand jury transcripts shall be subject to the order of the appropriate appellate court but that the seal shall not be broken except pursuant to an order entered either by that Court or by later order of this Court.

/s/ JOHN W. OLIVER
District Judge

Kansas City, Missouri
January 10, 1967

FOOTNOTES

1. That motion was filed November 9, 1966. Upon receipt of the mandate we ordered the parties to file appropriate briefs. We heard a full day of oral argument on October 7, 1966, during which leave for filing three more rounds of briefs was requested and granted. Defendant's postmandate motion was filed contemporaneously with defendant's last written brief.

2. It is to be noted that defendant admits that the government did not use the grand jury transcript for "impeachment" of the non-refreshment witnesses. It is not to be inferred from defendant's phraseology concerning the non-refreshment witnesses that defendant ever contended or that it now contends that the government attempted or in fact used grand jury transcripts for "impeachment" of any refreshment witness. Defendant did not and can not on the facts so contend. As will be noted later, some of defendant's arguments attempt to ignore those established facts.

3. "(D.B. 10/28/66, p. 11)" refers to page 11 of the brief filed by the defendant on October 28, 1966. "G.B. 11/16/66, p. . .," for example, will refer to the government's brief filed on November 16, 1966. Inclusion of the date on which the various briefs were filed eliminates the more complicated system used by the parties.

4. "(O.A. Tr. 16-17)" refers to pages 16-17 of the transcript of the postmandate oral argument heard October 7, 1966.

5. Defendant's argument as to the effect of the Supreme Court's mandate is most fully developed on pages 11 *et seq.* of Defendant's October 28, 1966 brief under the heading "This Court's Function on Remand is to Determine If the Requested Grand Jury Minutes Were Producible Under the Standards Laid Down in *Dennis*, and, If they Were, to Order a New Trial." The same argument is, however, threaded throughout various of defendant's other briefs. Cf. defendant's oral argument in which defendant's counsel argued that acceptance of the government's argument against granting a new trial "would lead Your Honor into what I

think would be certain error in case—in view of what the Court has done in *Dennis*'' (O.A. 153).

6. Examination of those pages in File VIII of the record shows that Refreshment Memoranda were presented to the Court not only in connection with the seven particular witnesses whose recollection the government sought to refresh, but were also presented with respect to witnesses (8) Callender, 3 possible refreshment points (VIII, 1204-1205); (9) Gibb, 9 possible points, (VIII, 1209-1212); (10) Isaacs, 4 possible points, (VIII, 1213-1214); (11) Martin, 3 possible points (VIII, 1215); (12) Clark, 3 possible points (VIII, 1216-1217); and (13) Heyer, 9 possible points (VIII, 1218-1219). No occasion for refreshment arose during the testimony of any of this group of witnesses. Our handwritten notations on each of the memoranda for this group of witnesses shows that we had studied the grand jury transcript *in camera* and that we were prepared to rule if a particularized need for refreshment had been shown by the government. The grand jury testimony of all thirteen witnesses reviewed in the separate *in camera* examinations will be included in our final order.

7. For further influence on this Court of the National Deposition Program of the electrical antitrust litigation in regard to disclosure of grand jury minutes in antitrust litigation generally, see *United States* v. *Max Factor Co.*, W.D. Mo. 1966, 39 F.R.D. 3.

8. Paragraph 10 of defendant's motion for new trial, confined solely to Counts Eleven, Twelve and Thirteen, expressly alleged that the government had used the grand jury transcript "to refresh the recollection" of the seven witnesses involved. That motion's assignment of error was limited to the trial court's refusal to permit defense inspection of the refreshment data; it did not in any way claim or suggest that the grand jury transcript had been used for impeachment purposes.

9. In response to a direct inquiry (O.A. Tr. 114), the defendant took the position that this case does not involve any question concerning the application of the principles stated in *Linkletter* v. *Walker*, 381 U.S. 618, *Tehan* v. *Shott*, 382 U.S. 406,

and *Johnson* v. *New Jersey*, 384 U.S. 719 (D.B. 10/28/66, p. 2-4; D. Memo. 11/9/66, p. 102). In a letter dated November 30, 1966, however, defense counsel directed our attention to *O'Connor* v. *Ohio*, No. 477 (October Term, 1966), 35 L.W. 3174. The defense there contended that this recent Supreme Court decision negates the government's argument in regard to the defendant's trial failure to file proper motions and that such case strongly supports defendant's position that *Dennis* relieved the defendant from any trial burden in that regard. *O'Connor* shows on its face that it involved an application of *Tehan* v. *Shott*.

We thought that any question about whether there was a *Linkletter-Tehan-Johnson* question in this case had been laid to rest by the government's agreement with the defense's earlier stated position that such a question was not presented in this case. See G.B. 10/28/66, p. 1. Because the defense's letter of November 30, 1966 places that rare agreement between the parties in jeopardy, we expressly reject defendant's most recent argument and hold that the principles applied in *O'Connor* v. *Ohio* have no application to this case. As distinguished from *Griffin* v. *California*, 380 U.S. 609, for an example, *Dennis* did not establish any new principle not theretofore announced in earlier Supreme Court decisions. Nor did *Dennis* overrule any Supreme Court case upon which defendant could properly rely as an excuse for its failure to move for relief in the trial court. See *Donnell* v. *Swenson*, W.D. Mo. 1966, 258 F. Supp. 317, for this Court's application of the principles of the *Linkletter-Tehan-Johnson* trilogy in a State prisoner habeas corpus case where questions of retrospectivity are frequently presented.

10. This Court, prior to the promulgation of the new Rules of Criminal Procedure, routinely ordered upon proper motion the production and disclosure for defense inspection of a defendant's grand jury testimony in perjury cases. See, for example, *United States* v. *Becker*, No. 21501, and *United States* v. *LaRocca*, No. 21505, directing delivery to the defense of the transcript of all of each defendant's grand jury testimony, both orders entered April 18, 1963, shortly before the trial of *National Dairy*.

11. See also the discussion of the Congressional reaction to improperly broad lower federal court applications of *Jencks* in *Palermo* v. *United States*, 360 U.S. 343 at 346, et seq., and at 363, et seq. of Mr. Justice Brennan's opinion concurring in result.

12. When we made inqury in connection with that matter at oral argument, counsel for the defense assured us that "I have no present evidence of any such thing at all" (O.A. Tr. 173).

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NATIONAL DAIRY PRODUCTS CORPORATION,
Defendant.
No. 20542

MEMORANDUM AND ORDER SUPPLEMENTING OPINION AND ORDER OF JANUARY 10, 1967

On January 16, 1967, the Court invited counsel to make suggestions in regard to the form of the order entered January 10, 1967. Counsel met with the Court this day and agreed that all foreseeable technical questions relating to defendant's right of appeal would be avoided by the addition of the following language to be added to the order of January 10, 1967:

> "It is FURTHER ORDERED that, in order to remove any possible doubts that this Court's order of January 10, 1967, is a final decision, judgment or order within the meaning of all applicable statutes and rules of procedure, the final Judgment and Order entered by this Court on June 22, 1964, should be considered to be and it is hereby re-entered of record as of this date."

For the reasons stated, it is

ORDERED that the language quoted above be added as a new and as the final paragraph of the order of January 10, 1967, as though the same was fully set forth therein.

/s/ JOHN W. OLIVER
District Judge

Kansas City, Missouri
January 18, 1967

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. NATIONAL DAIRY PRODUCTS CORPORATION, Defendant.	Criminal Action No. 20542

MOTION OF DEFENDANT, NATIONAL DAIRY PRODUCTS CORPORATION, FOR ORDER GRANTING NEW TRIAL

Defendant, National Dairy Products Corporation, by its attorneys, moves the Court for an order granting a new trial on Counts 1 through 13 of the indictment and, as grounds therefor, states:

1. Judgment was entered by this Court on jury verdicts against defendant on June 22, 1964 on Counts 1 through 13 of the indictment. The United States Supreme Court, on June 20, 1966, granted certiorari and vacated the judgment of the Court of Appeals which had affirmed the judgment of this Court, and remanded the cause to this Court "for further consideration in light of *Dennis* v. *United States*," 384 U.S. 855 (1966), decided the same date. Thereafter, pursuant to an order of this Court, briefs were filed by the government and by defendant, and oral argument was held on October 7, 1966. At said oral argument (Tr. 198), this Court stated that it would not consider defendant's contentions with regard to so-called "non-refreshment witnesses" unless a motion were filed with respect thereto.

This motion is filed pursuant to that observation by the Court, and in order to formalize defendant's motion for a new trial, and the grounds therefor, as theretofore set forth in its briefs.

2. As its first ground for a new trial, defendant states that government counsel, at the trial of this case, pursuant to leave of Court, utilized portions of the prior testimony of the following witnesses before the grand jury for the stated purpose of refreshing their recollections: Arthur Augenstein, John Flanagan, Frank Gardner, John W. Baird, David W. Stewart, Vincent Crimmins and Edward H. Gilmore (sometimes hereinafter referred to as "refreshment witnesses"). It is undisputed that in each instance, defense counsel moved to inspect the portions of the grand jury transcripts so utilized and all other portions concerning the same subject matter, and these motions were denied. The seven persons hereinabove listed were important witnesses at the trial and played important roles in the events at issue under the charges of the indictment (as set forth in defendant's briefs, including particularly Brief of Defendant on Remand dated September 16, 1966, pp. 15-17, and Appendix A thereto). By reason of these facts, defendant had a "particularized need" to inspect portions of the refreshment witnesses' grand jury testimony related to their testimony on direct examination at the trial, and other testimony relevant to the charges of the indictment, and denial of defendant's motions therefor constituted reversible error.

3. As its second ground for a new trial, defendant states that government counsel had access to the grand jury transcripts of numerous other important prosecution witnesses (hereinafter sometimes referred to as "non-refreshment witnesses"), and understands that they utilized the same

outside the courtroom in preparing said persons to testify against defendant. The non-refreshment witnesses were in most cases hostile to defendant, and they gave testimony which was helpful to the prosecution and harmful to the defense, and defendant's counsel had no access to their grand jury testimony. Illustrative of the importance of these witnesses, government counsel at the oral argument on October 7, 1966 asserted that the testimony of certain of these witnesses constituted "substantial evidence" in support of the charges in Count 11, even if the testimony of the seven "refreshment witnesses" was entirely excluded. The witnesses so identified included Phillips, Gibb, Pentz, Chapman, Edquist, Adams, Zarda, Meyer and Watson (Tr. 80-95). Defendant's attorneys made no motion to inspect pertinent grand jury testimony of the non-refreshment witnesses inasmuch as government counsel did not utilize the same at trial for impeachment or to refresh recollection, and defendant's attorneys believed that they were precluded from inspecting said grand jury transcripts under the decisions of the United States Supreme Court in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959).

The names of said non-refreshment witnesses, their business affiliations, transcript citations and the general nature of their testimony are as follows:

Name and Position	Testified At	Nature of Testimony
Edquist, Earhardt Chairman of Board, Fairmont	R. 238-320	Alleged co-conspirator official; testified as to conversations with defendant Wise re market conditions, gallon jug competition and Sealtest's philosophy on how to meet such competition.

Name and Position	Testified At	Nature of Testimony
Phillips, Glen General Manager-Vice President, Meyer Sanitary (Hawthorne-Mellody)	R. 323-404	A principal complaining witness; testified as to the alleged "Wise plan" and statements by Flanagan on Sealtest's philosophy on meeting gallon jug competition.
O'Bryan, J. M. District Manager, Foremost	R. 830-919	Alleged co-conspirator official; testified as to conversations re GX 181-A and with Wise, Stewart and Flanagan (Banfield also present) concerning pricing and market conditions.
Callender, William Division Manager, Foremost	R. 920-991	Alleged co-conspirator official; testified as to conversations with Wise, Gardner and Stewart (Banfield also present) concerning Sealtest's views on market pricing (including gallon jug pricing), discounts and gallon jug competition.
Banfield, Alfred Sealtest Auditor, Kansas City and Distributor areas	R. 1362-1549; 4464-4559 6528-6532	Sealtest official; testified as to Sealtest's pricing and accounting policies and practices.
Gibb, Edward Division Manager, Fairmont	R. 1612-1758	Alleged co-conspirator official; testified as to conversations with Stewart re market pricing and discounts; with Wise (Stewart, Flanagan and Gardner also present) re gallon jug competition and Sealtest's philosophy on how to meet it and re the need to "straighten out" the market.
Adams, Howard President, Adams Dairy	R. 1788-2086	A principal complaining witness; testified as to gallon jug competition, market pricing and conditions, and Sealtest's alleged intent to drive Adams Dairy out of the market.
Chapman, Robert President, Beverly Farms Dairy	R. 2086-2151	A principal complaining witness; testified as to his conversations, as spokesman for gallon jug operators, with Stewart (Flanagan also present) in which Stewart, *inter alia*, allegedly refused to raise prices due to gallon jug prices, and laid down other "conditions."

Name and Position	Testified At	Nature of Testimony
Zarda, Bernard Partner, Zarda Brothers Dairy	R. 2218-2347	A principal complaining witness; testified as to conversations in which Wise was referred to as a "mad dog"; also testified as to gallon jug pricing and discussions of the alleged "Wise plan."
Watson, Edward Owner, Cedar Crest Dairies	R. 2356-2483	A principal complaining witness; testified as to conversations in which Wise was referred to as a "mad dog"; also testified as to gallon jug and general market pricing.
Isaacs, Richard Sealtest Distributor, Mexico	R. 2906-2966 4874-4888	A principal witness concerning Counts 7 & 8 (Mexico).
Weber, Anthony Owner, Hannibal Quality Dairy, Mexico	R. 3025-3030	A principal complaining witness, Counts 7 & 8 (Mexico).
Martin, Merle Sealtest Distributor, Paola-Osawatomie	R. 3323-3392	A principal witness concerning Counts 1 & 2 (Paola-Osawatomie).
Theno, Harold President, Pure Gold Dairy Paola-Osawatomie	R. 3392-3505	A principal complaining witness, Counts 1 & 2 (Paola-Osawatomie).
Sheehan, Mike, Jr. Partner, Sheehan Dairy, Paola-Osawatomie	R. 3505-3546	A principal complaining witness, Counts 1 & 2 (Paola-Osawatomie).
Casper, George President, Pure Gold Dairy, Paola-Osawatomie	R. 3573-3614	A principal complaining witness, Counts 1 & 2 (Paola-Osawatomie).
McCarthy Frank Accountant, Pure Gold Dairy, Paola-Osawatomie	R. 3621-3630	A principal complaining witness, Counts 1 & 2 (Paola-Osawatomie).
Newton, Raymond Sealtest Distributor, Sedalia	R. 3868-3917	A principal witness concerning Counts 3 & 4 (Sedalia)

Name and Position	Testified At	Nature of Testimony
Greer, William Sales Manager- Vice President, Tullis-Hall Dairy, Sedalia	R. 3920-3974	A principal complaining witness, concerning Counts 3 & 4 (Sedalia).
Freese, George Owner, Freese Dairy, Sedalia	R. 3974-3999	A principal complaining witness, concerning Counts 3 & 4 (Sedalia).
Heyer, Chester Sealtest Distributor, Lexington	R. 4048-4117 4827-4849	A principal witness concerning Counts 5 & 6 (Lexington).
Allen, W. D. Wholesale Sales Manager, Fairmont, Lexington	R. 4118-4130	A witness concerning Counts 5 & 6 (Lexington).
Hackler, Maurice Employee of Chester Heyer, Lexington	R. 4130-4141	A witness re Counts 5 & 6 (Lexington).
Christian, Kenneth Employee, Kelly Dairy, Lexington	R. 4145-4170	A complaining witness re Counts 5 & 6 (Lexington).
Duggins, Juanita Owner, Duggins Dairy, Lexington	R. 4171-4184	A principal complaining witness re Counts 5 & 6 (Lexington).
Burton, Edsell Employee, Duggins Dairy, Lexington	R. 4184-4200	A complaining witness re Counts 5 & 6 (Lexington).
Craig, Paul Sealtest Distributor, Glasgow	R. 4205-4241	A principal witness concerning Counts 9 & 10 (Glasgow).
Meyer, Freddy Owner, Meyer Dairy, Glasgow	R. 4248-4280; 6659-6663	A principal complaining witness re Counts 9 & 10 (Glasgow).
Arnsperger, Leroy Owner, Arnsperger Dairy, Glasgow	R. 4296-4328	A principal complaining witness re Counts 9 & 10 (Glasgow).
Holt, James Employee, Duggins Dairy, Lexington	R. 6674-6678	Government's rebuttal witness re Counts 5 & 6 (Lexington).

4. Defendant's "particularized need" to examine the pertinent grand jury testimony of the "non-refreshment witnesses" is shown by the following facts:

A. Four of the "non-refreshment witnesses" were executives of alleged co-conspirator competitor companies; their disagreement with defendant's personnel concerning gallon jug policy was sharp and the source of bitter feeling, as reflected in their trial testimony; there is reason to believe that these witnesses were hostile to defendant's personnel owing to the latter's refusal to accede to their wishes to increase prices on July 1, 1958; and there is reason to believe that said persons gave testimony before the grand jury placing the blame on defendant for market conditions, consistent with the government theories as set forth in the indictment and at trial. The fact that said persons were named as alleged co-conspirators, but not as defendants, is further evidence that they cooperated with the government attorneys at the time of the grand jury hearings, adversely to defendant's interests.

Included among such alleged co-conspirator competitor officials were Earhardt Edquist, Chairman of the Board of Fairmont; J. M. O'Bryan, District Manager, Foremost; William Callender, Division Manager, Foremost, and Edward Gibb, Division Manager, Fairmont (the hostility toward defendant of Edward Gibb is reflected in the "Refreshment Memorandum" which government counsel furnished to this Court during trial, wherein Gibb is indicated to have stated to the grand jury his opinion that defendant was losing money "by design" — see VIII Pl. 1209-12). W. D. Allen, Wholesale Sales Manager of Fairmont, was an employee of an alleged co-conspirator competitor, but was not personally named an alleged co-conspirator.

B. Glen Phillips, General Manager-Vice President, Meyer Sanitary (Hawthorn-Mellody), had been an officer of a competitor company which was allegedly a victim of the conspiracy charged in Count 11 during 1957, and his testimony reflects his antagonism toward defendant for its independent pricing policy during 1958.

C. Several others of the "non-refreshment witnesses" were officers or principals of competitor companies allegedly injured by defendant's challenged activities, and most of these companies were (or after the trial became) treble damage plaintiffs in civil suits against defendant for alleged violations of the antitrust laws. Among such executives of treble damage plaintiff concerns were Howard Adams, Robert Chapman, Bernard Zarda, Edward Watson, Anthony Weber, Harold Theno, George Casper, Frank McCarthy, Juanita Duggins (and her ex-employees Edsell Burton and James Holt), and Leroy Arnsperger. The above-listed treble damage plaintiff personnel were with but limited exceptions unavailable to defendant's counsel for interview prior to trial either because of unwillingness or because their attorneys declined to permit such interviewing. In addition, defendant's motions to lift the stay orders in certain of these treble damage cases in order that defendant might take the depositions of said persons, were denied by this Court (see, *e.g.*, Orders dated December 29, 1960 in *Adams Dairy* v. *National Dairy Products Corporation*, No. 11,994, and in *Beverly Farms, et al* v. *National Dairy Products Corporation*, No. 12,028, entered by Judge Albert A. Ridge and Judge R. Jasper Smith). Other representatives of competitors of defendant who, according to the government's bills of particulars and according to their trial testimony, allegedly were injured by defendant's challenged acts include Mike Sheehan, Jr., Sheehan Dairy;

William Greer, Sales Manager-Vice President, Tullis-Hall Dairy; George Freese, Freese Dairy; Freddy Meyer, Meyer Dairy, and Kenneth Christian, Kelly Dairy.

D. Several "non-refreshment" prosecution witnesses were employees of defendant, distributors of defendant's products, or employees of such distributors. Alfred Banfield was an employee; Richard Isaacs, Merle Martin, Raymond Newton, Chester Heyer and Paul Craig were distributors or former distributors of defendant; Maurice Hackler was an employee of distributor Heyer. Banfield and the named distributors were claimed to be co-conspirators with defendant in the offenses charged.

E. Defendant is without knowledge as to whether or not impeachment material or material otherwise useful to the defense is contained in the grand jury testimony of the non-refreshment witnesses hereinabove listed, but avers that there is a reasonable possibility that said testimony contains impeachment material, including statements inconsistent with, explanatory of or useful in placing in proper perspective their testimony given at the trial, or otherwise useful to the defense. Defendant further has no knowledge as to whether the grand jury testimony of the non-refreshment witnesses hereinabove listed contains material which might have been affirmatively helpful to the defense and, having been forgotten or concealed by said persons, was not called to their attention by government counsel; however, defendant believes there is a strong possibility that said grand jury testimony contains such material.

WHEREFORE, defendant respectfully moves that the foregoing motion for a new trial be granted.

/s/ JOHN T. CHADWELL
John T. Chadwell

/s/ RICHARD W. McLAREN
Richard W. McLaren
135 South LaSalle Street
Chicago, Illinois 60603

/s/ MARTIN J. PURCELL
Martin J. Purcell
1701 Bryant Building
Kansas City, Missouri 64106

Attorneys for Defendant
National Dairy Products
Corporation

November 9, 1966

VERIFICATION

STATE OF MISSOURI } ss:
COUNTY OF JACKSON }

MARTIN J. PURCELL, being duly sworn, states that he is one of the attorneys for defendant, National Dairy Products Corporation; that he participated in the preparation of the foregoing Motion and that the facts stated therein are true and, as to all other matters therein stated, they are true to the best of his knowledge and belief.

/s/ MARTIN J. PURCELL

SUBSCRIBED AND SWORN to before me this 9th day of November, 1966.

/s/ MAXINE B. WYMAN
Notary Public in and for the
County of Jackson, State of
Missouri

(NOTARIAL SEAL)

STATE OF ILLINOIS
COUNTY OF COOK } ss:

RICHARD W. McLAREN, being duly sworn, states that he is one of the attorneys for defendant, National Dairy Products Corporation; that he participated in the preparation of the foregoing Motion and that the facts stated therein are true and, as to all other matters therein stated, they are true to the best of his knowledge and belief.

/s/ RICHARD W. McLAREN

SUBSCRIBED AND SWORN to before me this 8th day of November, 1966.

/s/ CHARLES B. INGELS
Notary Public in and for the
County of Cook, State of Illinois.

(NOTARIAL SEAL)

SUPREME COURT OF THE UNITED STATES

NATIONAL DAIRY PRODUCTS CORP. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 758. Decided June 20, 1966.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Dennis* v. *United States*, 384 U.S. ...

SUPREME COURT OF THE UNITED STATES

No. 758, October Term, 1965

National Dairy Products Corporation,
Petitioner,

v.

United States

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Missouri for further consideration in light of Dennis v. United States, 384 U.S. ...

June 20, 1966

A true copy
Test: /s/ JOHN F. DAVIS
Clerk of the Supreme Court of the United States

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,734

National Dairy Products Corporation,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[August 27, 1965.]

[350 F. 2d 321]

Before JOHNSEN, VOGEL and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

National Dairy Products Corporation (National or appellant) has appealed from the judgment of conviction on seven counts of an indictment charging a conspiracy to fix prices and eliminate competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and on six counts charging sales of milk at unreasonably low prices for the pur-

pose of destroying competition in violation of § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a.[1]

The indictment alleged violations in seven different market areas. A Sherman Act violation and a Robinson-Patman Act violation were alleged to have occurred in each market area. Thus, Counts 1 and 2 related to Paola-Osawatomie, Kansas; Counts 3 and 4 to Sedalia, Missouri; 5 and 6 to Lexington, Missouri; 7 and 8 to Mexico, Missouri; 9 and 10 to Glasgow, Missouri; 11, 12 and 13 to Greater Kansas City; 14 and 15 to Butler, Missouri; Raymond J. Wise, a vice-president and director of National, was named as a defendant in Counts 11, 12 and 13.[2] The trial commenced on June 13, 1963, and proceeded without unnecessary interruption until August 16, 1963. Ninety-seven witnesses testified, over 7,000 pages of transcript were produced and more than 600 exhibits were introduced. The jury, after nearly three days of deliberation, returned verdicts of guilty on Counts 1 through 13 and verdicts of not guilty on Counts 14 and 15.

Post-trial motions for judgment notwithstanding the

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1. The indictment returned on September 16, 1959, contained 15 counts. Two intermediate appeals were taken by the United States from orders of the United States District Court (the late R. Jasper Smith). In *United States* v. *Wise*, 370 U.S. 405 (1962), the Supreme Court reversed an order of the district court which had dismissed Wise, and held that the Sherman Act imposes personal liability upon corporate officials for acts done in violation of the Act. In *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963) the court reversed the district court order which had dismissed the Robinson-Patman Act counts, and held that § 3 of the Robinson-Patman Act was not unconstitutionally vague as applied under the indictment.

2. Counts 1, 3, 5, 7, 9, 11, 12 and 14 alleged Sherman Act violations; Counts 2, 4, 6, 8, 10, 13 and 15 alleged Robinson-Patman Act violations.

verdict and, in the alternative, for a new trial, were filed by both National and Wise. The motions were competently briefed by counsel. After oral argument the motions were denied. The court's supporting opinion is reported at 231 F.Supp. 663 (1964).

The Court (Honorable John W. Oliver) then fined National $50,000 (the maximum) for each of the seven Sherman Act violations, and $5,000 (the maximum) for each of the six Robinson-Patman Act violations, a total of $380,000. Wise was fined $25,000 on each of Counts 11 and 12 and $2,500 on Count 13, a total of $52,500. Wise also received a suspended jail sentence of three months on each of Counts 11, 12 and 13, to run concurrently.[3] Both National and Wise appealed but, later, Wise filed a motion to dismiss his appeal, which we granted on November 30, 1964.

Appellant advances six basic contentions relating to (1) the procedure for handling of grand jury minutes and appellant's motion to inspect portions used; (2) the court's instructions to the jury; (3) the court's attitude; (4) rulings on evidence; (5) the court's rejection of the circumstantial evidence rule and (6) the insufficiency of the evidence to make a jury case on Counts 1 and 2, relating to the Paola-Osawatomie market, and Counts 11 and 13, relating to the Greater Kansas City area market. Numerous subsidiary claims of error are presented in support of each basic contention.

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3. Post-trial proceedings held on June 22, 1964, in connection with imposition of the fines and sentence, show that on February 23, 1962, following entry of a plea of nolo contendere in the United States District Court of Maryland, National was fined a total of $12,500 for two Sherman Act violations and that on June 15, 1964, following a plea of nolo contendere in the United States District Court of Massachusetts, National was fined $25,000 for a Sherman Act violation.

Before examining, considering and disposing of appellant's contentions, a resume of pertinent facts, ascertained from undisputed evidence, is in order.

National, a large company, is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States. Its products are sold under several trade names, including "Sealtest" and "Kraft." During the period of time covered by the indictment, defendant Wise had been an officer and director of National in charge of its Sealtest Central Division, which included the midwestern states.

National operates a processing plant in Kansas City, Missouri, and has been in competition with other national dairies and local small dairies, both in the Greater Kansas City area (which consists of Jackson and Clay Counties, Missouri, and Wyandotte and Johnson Counties, Kansas) and in a number of small outlying cities and towns in Missouri and Kansas. In the Greater Kansas City market, National, through its employees, primarily distributes its products directly to stores and home delivery customers. In the other cities and towns in Missouri and Kansas it usually sells its milk in paper cartons to independent distributors, who in turn resell the milk to their own customers.

The Government, of course, urges that the jury's verdicts on all counts were responsive to, and fully supported by, the evidence. Although appellant challenged the legal sufficiency of the evidence as to all counts by filing timely motions for judgment of acquittal and post-trial motion for judgment notwithstanding the verdict in the district court, here appellant, in effect, concedes a submissible case was made as to all counts except 1 and 2, and 11 and 13.

However, appellant does contend that the trial court

applied an erroneous standard in evaluating the evidence under all thirteen counts (and particularly under Count 11) of which appellant was found guilty. Arguing that the evidence was wholly circumstantial—not direct—appellant seeks application here, as it did below, of the circumstantial evidence rule under which "[u]nless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused." *Pevely Dairy Co.* v. *United States,* 178 F.2d 363, 370 (8 Cir. 1949), citing *Salinger* v. *United States,* 23 F.2d 48, 52 (8 Cir. 1927).

In denying appellant's motion for judgment of acquittal at the close of the Government's case relating to Counts 11, 12 and 13, the trial court was of the view that this court's opinion in the *Pevely Dairy* case, supra, did not establish a "substantive rule of law" concerning the circumstantial evidence rule. Rather, the court determined that it should only "consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt."[4]

The so-called "circumstantial evidence" rule "is applicable only where the evidence is wholly circumstantial and if there is any direct evidence in the case for the government which would be sufficient if believed by the jury to show defendant's guilt, then the rule as to circumstantial

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4. The trial judge was attempting to follow the rule of *Holland* v. *United States,* 348 U.S. 121, 139-140 (1954). In overruling the motion for a directed verdict, he indicated to counsel that the jury should be given an instruction on circumstantial evidence. The court did instruct on circumstantial evidence and no exception was taken to that instruction, nor complaint made of it on this appeal.

evidence may not be invoked." *Finnegan* v. *United States,* 204 F.2d 105, at p. 114 (8 Cir. 1953). See also *Pevely Dairy Co.* v. *United States,* supra; *Beatrice Foods Co.* v. *United States,* 312 F.2d 29 (8 Cir. 1963); *Sykes* v. *United States,* 312 F.2d 232 (8 Cir. 1963); *Hunt* v. *United States,* 316 F.2d 652 (D.C. Cir. 1963). Contrary to appellant's claim, the evidence was not wholly circumstantial. There was also some direct evidence. Moreover, even if we were to view the evidence as wholly circumstantial, the court would not be compelled to determine that all hypotheses flowing from the evidence were as consistent with innocence as with guilt; it would be for the jury to determine the guilt or innocence of the defendant.

In resolving the sufficiency of the evidence question we are required to view the evidence in the light most favorable to the Government, the prevailing party. "It is axiomatic by now that on appeal from a conviction it is not for us to weigh the evidence 'but only to consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt.'" *Beatrice Foods Co.* v. *United States,* supra, at 40, and cases there cited.

The Sufficiency of the Evidence.

Before considering the sufficiency of the evidence under Counts 1 and 2, we take note of pertinent background information relating to Counts 1 through 10, the so-called "distributor counts." These counts are concerned with situations in which small dairies had been selling gallon jugs of milk in local markets at a lower price than the price at which National was selling milk in individual paper half gallons. The price differential was necessitated by the disadvantages inherent in gallon jug milk. Gallon jugs contain more milk than many purchasers pre-

fer to buy at one time; jugs are heavy, unwieldly, breakable and not as easily stored as paper cartons. There is usually a deposit required on a gallon jug which is only refundable after the jug has been cleaned and returned. Since small dairies can produce and sell milk in gallon jugs more inexpensively than large dairies can sell milk in paper half gallons, the small dairies were able to offer a substantial differential and still make a profit.

National and its distributors, dissatisfied with gallon jug competition, decided to force the small dairies to raise prices or National would lower its prices enough to substantially reduce or eliminate the differential between the price of a gallon jug and two paper half gallons. National was able to successfully reduce the differential to a point where the small dairies lost considerable business and some of the smaller dairies were forced to either drop the sale of milk in gallon jugs or close their businesses.

Count 1.

Count 1 of the indictment charged that "[b]eginning in or about January, 1955," "and continuing until the return of this indictment" (September 16, 1959) National conspired with its distributor, Merle Martin, "to fix in-store milk prices and to eliminate competition in the sale of milk in the Paola-Osawatomie, Kansas market."[5]

The conspiracy alleged in Count 1 was: (a) that Martin would sell milk to stores at prices agreed upon with National; (b) that National would guarantee Martin a specific gross margin of profit on such sales; (c) that National and Martin would persuade, induce, and coerce

5. "In-store milk prices" are the prices at which milk is sold to stores by a distributor.

small dairies (Pure Gold Dairy and Sheehan Dairy) to fix and maintain a price differential acceptable to National between the gallon jug and two half gallon paper cartons; (d) that National would sell milk to Martin below cost and Martin would resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by the small dairies.

In challenging the Count 1 evidence, appellant contends: (a) that a resale price-fixing agreement between National and its sole distributor in the Paola-Osawatomie market does not constitute unlawful price-fixing in violation of § 1 of the Sherman Act; (b) that National cannot be held responsible for the conduct of its wholly owned subsidiary, Chapman Dairy, during 1955 and 1956; and (c) that there is no competent evidence, after December 31, 1956, to prove that National had entered into a conspiracy with its distributor, Martin, in violation of § 1 of the Sherman Act.

A review of the evidence shows that appellant's contentions are without merit.

There is no longer any doubt about the illegality of vertical price-fixing agreements. Such arrangements, unless they fall within the scope of a state resale price maintenance law, have been found to be illegal time and time again. *White Motor Co.* v. *United States*, 194 F. Supp. 563 (1961), rev'd on other grounds, 372 U.S. 253 (1963); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373 (1911).

Prior to December 31, 1956, Chapman Dairy was a wholly owned subsidiary of National; National's board of directors approved or disapproved of the proposed list of directors for Chapman; Chapman received National's

approval before making capital investments; Chapman's personnel policies were established by National; Chapman's key employees had stock option plans to purchase National stock; Wise, a National official, had power to override Chapman's president (who had originally been recommended for office by Wise); Wise was kept informed on all decisions made by Chapman's president; Chapman's products were sold under the Sealtest trade name; Wise spent many months in Kansas City (where Chapman Dairy was located); Chapman's production reports were submitted to National for approval and National's officials often conducted the monthly sales department meetings where prices, market conditions, costs and competitors' prices were discussed. We deem it unnecessary to enumerate the other additional facts in the record which show National's close relationship with Chapman.

On December 31, 1956, Chapman Dairy was formally merged with National. In its annual report to stockholders of record in 1956, National described its merger with Chapman as a mere simplification of its corporate structure to increase operational efficiency and to produce savings in income tax. Wise characterized his relationship with the president of National's subsidiary (and after the merger, the manager) as that of a "partner."

The evidence clearly indicates that Chapman was not an *independent* subsidiary of National. The relationship between parent and subsidiary was not one of stock ownership alone. Chapman was run by National in accordance with National's policies and objectives, and with independent existence in form only. In such a situation the courts may disregard the legal fiction of corporate entity. *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic Ass'n*, 247 U.S. 490, 501 (1918). See also *Consoli-*

dated Rock Products Co. v. *Du Bois,* 312 U.S. 510 (1941); *United States* v. *Delaware, Lackawanna & Western R. R. Co.,* 238 U.S. 516 (1915). Cf. *Consolidated Sun Ray, Inc.* v. *Oppenstein,* 335 F.2d 801 (8 Cir. 1964). Since Chapman Dairy was merely an operating division of National Dairy in corporate form, the jury was entitled to find National liable for any conspiratorial conduct in which Chapman might have engaged with its distributor, Martin, prior to the formal merger of Chapman with National on December 31, 1956.

It is hardly debatable that there is an abundance of evidence to show a conspiracy between National, acting through Chapman Dairy, and Martin during 1955 and 1956. During those years and, in fact, during the entire period of time covered by the indictment, the significant competitors in Osawatomie were, in addition to Martin, Pure Gold Dairy and Sheehan Dairy. The only significant competitor in Paola was Pure Gold Dairy. From the evidence the jury was free to find that the conspirators were successful in reducing the differential in price between the gallon jugs, sold by Pure Gold and Sheehan Dairies, and the paper half gallons, sold by National, to a level which made it impossible for the gallon jugs to remain on the market. After a series of price cuts designed to (and which, in fact, did) narrow the differential between gallon jugs and paper half gallons, the smaller dairies lost considerable business and one of them was forced to discontinue the gallon jug and sell its milk in paper half gallons.

Neither are we able to agree with appellant that there is no evidence to show that, subsequent to December 31, 1956, National had a price-fixing agreement with its distributor, Merle Martin. There was probative evidence from which the jury could find that National dictated Martin's prices; indeed, Martin freely admitted that he

adhered to the prices indicated by the Sealtest representatives. Additionally, it was proved that National sold its milk to Martin at a loss during July and August of 1958; in fact, in August, Martin received milk from National at a price lower than National's cost for raw milk.

Count 2.

Count 2 of the indictment charged that "[b]eginning on or about July 15, 1958 and continuing thereafter until about August 27, 1958" National sold milk to its "distributor in the Paola-Osawatomie, Kansas market at unreasonably low prices", "at prices below National's cost" for the purpose of destroying competition.

Appellant tacitly concedes that the evidence affords proof that appellant sold to Martin below cost for about six weeks in July and August, 1958. It contends, however, that there is no evidence that appellant did this "for the purpose of restricting or eliminating the sale of milk" by Pure Gold and Sheehan. Of course, National's officers made no direct references to, nor statements of, National's predatory intent. But the absence of *direct* evidence of that nature does not mean that there was *no* evidence of predatory intent. The jury had the right to consider all of the facts and circumstances and it was fully justified in finding the requisite intent from the course of conduct pursued by appellant. Furthermore, appellant does not question or challenge the evidence of predatory intent which was an essential element of the convictions under the other Robinson-Patman Act counts. Such evidence was relevant for the purpose of showing intent under this count. Cf. *Copeland* v. *United States,* 152 F.2d 769 (D.C. Cir. 1945); *Kowalchuk* v. *United States,* 176 F.2d 873, 877-878 (6 Cir. 1949).

The sum total of the evidence bearing upon Counts 1 and 2 has received our careful consideration. Further elaboration thereon is unnecessary. Viewing the evidence in the light most favorable to the Government, we are convinced that a factual issue was presented, that the court properly denied the motion for judgment of acquittal, and that the jury verdict was supported by substantial evidence.

Count 11.

National and Raymond J. Wise were indicted and made defendants in this count and "[a]ll out-of-State dairies, doing business in the Greater Kansas City market" and their officers and agents were named as co-conspirators. This count charged that "[b]eginning in or about September, 1957 and continuing until some time in October of 1957" National, Wise and the other co-conspirators engaged in a conspiracy to "eliminate price competition in the sale of milk in the Greater Kansas City market" in violation of § 1 of the Sherman Act.

Allegedly the conspiracy consisted of a continuing agreement, the substantial terms of which were: (a) to hold meetings in Chicago, Illinois, and Kansas City, Missouri, to discuss ways and means to (1) require Meyer Sanitary Milk Company to withdraw a discount it had offered on or about August 1, 1957, to Milgram Food Stores, and (2) require small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons; (b) to start a milk price war on or about September 13, 1957; (c) to limit the milk price war to the Greater Kansas City market; (d) to increase the milk prices on or about October 10, 1957, to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957,

and (e) to induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or about October 10, 1957.

Relying upon the circumstantial evidence rule discussed, supra, appellant asserts "the evidence * * * fails to support even a strong suspicion that appellant participated in a conspiracy as charged." We are not so persuaded. A careful and thorough review of the record indicates that there was substantial evidence from which the jury could legitimately infer that there was a conspiracy between National and other out-of-state dairies to cause a price war with the dual purpose of (a) forcing Meyer Sanitary Dairy to withdraw the 13% discount offer made to the chain of Milgram Stores, which was one of National's largest accounts in Kansas City, and (b) narrowing the price differential between gallon jugs and paper half gallons. It is well settled that:

> "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809-810 (1946).

See also *Johnson* v. *Yost Lumber Co.,* 117 F.2d 53, 57 (8 Cir. 1941); *Esco Corp.* v. *United States,* 340 F.2d 1000 (9 Cir. 1965), where the court pertinently observed at 1007:

> "While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy

> can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. * * * A knowing wink can mean more than words."

In addition to statements made by gallon jug operators and officials of the out-of-state dairies, it appears without dispute that during the indictment period there were at least six meetings or conversations between National officials and officials of one or several out-of-state dairies at which prices, Meyer Sanitary Dairy's discount offer to Milgram, or gallon jug differentials were discussed. The record also indicates that National supplied some proposed price lists to the out-of-state dairies and informed them of intended price changes. Significantly, price changes were always simultaneously and uniformly effected by National and the out-of-state dairies. Further detailing of the evidence is not required. It is abundantly clear that the jury's verdict under this count does not rest upon mere suspicion but rather upon substantial probative evidence.

Count 13.

This count, as supplemented by the Bill of Particulars, charged that National, from July 14, 1958 through August 27, 1958, sold milk in the Greater Kansas City market at "unreasonably low prices" for the purpose of destroying competition; that National utilized the advantages it possesses because it operates in a great many different geographical localities, to finance and subsidize a price war against the small competing dairies by intentionally selling milk at prices below its cost.

Here, the basic controversy is whether appellant, during the period of time covered by this count, sold its milk "below cost." The answer depends upon the meaning

of the term "below cost." Appellant contends that a below cost sale is one made at a price lower than direct cost, i.e., raw material (milk), processing and container costs. The Government disagrees and asserts that a below cost sale is one made below fully distributed cost, which includes the cost of production, plus the additional allocated delivery, selling and administrative costs.

This precise question was not settled by the Supreme Court when it decided that § 3 of the Robinson-Patman Act, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is not unconstitutionally vague or indefinite, as applied to sales made *below cost* and with specific intent to destroy competition. *United States* v. *National Dairy Products Corp.*, supra.

The Court was careful to state that its opinion was not to be construed as a categorical denouncement of every sale below cost. It recognized that certain business exigencies could justify such a practice. It announced that "[i]n proscribing sales at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor' we believe that Congress condemned sales made below cost *for such purpose.*" (Emphasis supplied). *Id.* at 34. And "[w]hether 'below cost' refers to 'direct' or 'fully distributed' cost or some other level of cost computation cannot be described in the abstract." *Id.* at 34.

Although the Court tacitly recognized the difficulties inherent in placing reasonable boundaries on its holding, it stressed the need for a "predatory intent" in connection with the sale of goods below cost.

We have carefully studied *National Dairy Products* and conclude that it teaches: (1) that liability under § 3 may be imposed when the following elements are present; (a)

sales at prices below some level of cost, and (b) intent to destroy competition or eliminate a competitor; (2) that the question whether sales are "unreasonably low" so as to impose liability under § 3 must be determined on the facts of each case—on an ad hoc basis; and (3) that the predatory or competitive nature of the seller's price, rather than theoretical cost considerations, is the real index of its legality. The question resolves itself into one of intent and purpose, not a choice of accounting methods. See also Rowe, "Price Discrimination Under the Robinson-Patman Act," p. 466; *Ben Hur Coal Co.* v. *Wells,* 242 F.2d 481 (10 Cir. 1957); *Hershel California Fruit Products Co.* v. *Hunt Foods, Inc.,* 111 F.Supp. 732, 734 (1953); *F. & A. Ice Cream Co.* v. *Arden Farms Co.,* 98 F.Supp. 180, 189-190 (1951).

Guided by the foregoing principles, we have no great difficulty in concluding that even though appellant made no sales below *direct cost* during the period of time covered by Count 13, the question whether it violated § 3 by selling below *fully distributed cost* was, in view of all the facts and circumstances, one to be resolved by the jury under proper instructions. Appellant, a nation-wide corporation, with immense financial resources, was able to, and did, make sales in July and August, 1958, in the Greater Kansas City market considerably below its fully distributed costs. National's operating statement shows that in July and August its losses in that market computed on the basis of fully distributed costs, were over $46,000 and $73,000 respectively. Of course, such below cost sales were not sufficient, standing alone, to subject National to the sanctions of § 3. It was incumbent upon the Government to offer evidence that such below cost sales were concomitant with a predatory intent. And, contrary to appellant's claim, there was evidence from

which the jury could, and did, find that appellant's practices were designed to destroy competition or eliminate a competitor. We hold that the district court properly submitted this count to the jury.

Grand Jury Minutes.

The Government called as witnesses persons who had been officers and employees of National or of co-conspirator corporations. During direct examination some of these witnesses indicated a tendency to forget, or an inability to recall, pertinent facts. The first occurrence of this nature took place during the direct examination of the Government's third witness, John Flanagan, the general sales manager for Sealtest Foods (a division of National) in Kansas City, Missouri. Upon request of the Government attorney for permission to use the grand jury transcript, or minutes, to refresh the witness' recollection, a lengthy conference ensued in chambers. In this conference the court directed that grand jury testimony be used in accordance with the following guidelines: (1) that Government counsel would "make its trial inquiry in substantially the same language as the question was asked the witness before the grand jury * * * ;" (2) that Government counsel would mark in advance all of a witness' testimony relating to the topic to be refreshed, and designate specifically the questions in the transcript that the Government contemplated asking; (3) that the court would determine whether the questions that the Government intended to ask "would reasonably have the effect of refreshing the particular witness' memory;" and (4) that Government counsel themselves would read the grand jury transcript but not "in an accusatory manner" and without histrionics, and "if counsel inadvertently became enthusiastic about the manner and the tone in which they

would utilize this testimony * * *," the trial judge would conduct the examination himself. Also, the witnesses would not be permitted to examine their prior testimony.

Counsel for National and Wise, apparently recognizing that grand jury minutes, under proper circumstances, may be used for the purpose of refreshing the recollection of witnesses, offered no objection to the procedure envisioned by the court. They did, however, move unsuccessfully for the privilege of examining the portions of the grand jury transcript which the Government intended to use. Neither does appellant, on this appeal, dispute that the Government was entitled to use the grand jury transcript for refreshment purposes. Rather, it contends that the court permitted Government counsel to use the grand jury testimony for impeachment purposes and as substantial evidence and, therefore, that the court erred in denying its motion to inspect the transcript.

It is fundamental that grand jury proceedings are cloaked with a veil of secrecy. "Grand jury testimony is ordinarily confidential." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943); *Beatrice Foods Co.* v. *United States*, supra. This "indispensable secrecy of grand jury proceedings," *United States* v. *Johnson*, supra, at 513, may be disregarded only when there is a compelling necessity—when the need outweighs any countervailing policy. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959). The inspection of grand jury minutes and the use of grand jury testimony have been permitted for the purpose of refreshing witnesses' recollections. *United States* v. *Socony-Vacuum Oil Co.*, supra, (in which there were ninety instances when the Government used grand jury testimony to refresh recollection of

witnesses); *Cox* v. *United States*, 284 F.2d 704, 706 (8 Cir. 1960). No iron-clad rule requires that counsel for the defense be shown the grand jury transcript where, as here, it is not shown to the witnesses and where, as here, an appropriate procedure is adopted and followed to prevent its improper use. *United States* v. *Socony-Vacuum Oil Co.*, supra, at 233. In the final analysis, the question whether disclosure should be permitted is one addressed to the sound discretion of the trial court. Rule 6(e) F.R. Cr.P.; *Pittsburgh Plate Glass Co.* v. *United States*, supra, at 399.

However, error would result when the prior testimony is used as substantial evidence, *United States* v. *Socony-Vacuum Oil Co.*, supra, at 234; *Cox* v. *United States*, supra, at 708, or when it is used for impeachment purposes, if the defendant is denied the right to inspect such prior testimony, *United States* v. *Cotter*, 60 F.2d 689 (2 Cir. 1932); cf. *Continental Baking Co.* v. *United States*, 281 F.2d 137, 146-148 (6 Cir. 1960); or when the refreshing material is deliberately used for purposes not pertinent to the issues to arouse the passions of the jurors, so that an objective appraisal of the evidence is unlikely. *United States* v. *Socony-Vacuum Oil Co.*, supra, at 234.

The record does not support the argument that the grand jury testimony was used for impeachment purposes or as substantial evidence and no objection of either nature was made during the trial. Appellant's failure to object on this ground would justify us in declining to consider this allegation of error. Rule 51 F.R.Cr.P.; *Isaacs* v. *United States*, 301 F.2d 706, 734-736 (8 Cir. 1962); *Cox* v. *United States*, supra, at 709.

We have nonetheless considered the contention on its merits. Use of the grand jury testimony was limited to the stated purpose of refreshment, in strict conformity

with the court's instructions. The court took every precaution to limit the jury's consideration of the evidence. Thus, when the question arose, the court explained to the jury:

> "The important thing for the jury to keep in mind is that whatever document may be used to refresh a witness' recollection, whether it is a telephone book, whether it is a letter that he may have written, whether it is transcribed testimony before a grand jury, the particular document that is used for that purpose is not to be considered by you as affirmative evidence in this case. It is merely used for the purpose of refreshing the witness' recollection. The witness' recollection may be refreshed, and if it is, he will say so."

The jury was similarly reminded as the trial progressed, and finally this instruction was given:

> "You will recall that there were several occasions when some testimony taken before the grand jury or before a Congressional Committee was read to a witness for the purpose of refreshing his recollection. Such testimony is not evidence and the only purpose in having it read was to attempt to revive or refresh the memory of the witness."

In summary, no judicial abuse of discretion has been demonstrated.

Appellant claims that yet another error arose from the use of the grand jury testimony.

Government counsel furnished the court, but not appellant's counsel, with memoranda, before the examination of the first witness whose grand jury testimony was used for refreshment purposes. Here, appellant takes the position that "[n]ot until perfection of this appeal did [it] learn that the 'citations' furnished to the court * * * included a legal memorandum, and * * * material other than

citations to the grand jury transcript."[6] Appellant's claim of error is that the "*ex parte* 'refreshment' memoranda together with its *ex parte* legal memorandum were calculated to," and "actually did, influence the court's rulings both on points of law and on evidence, adversely to appellant."

We are not impressed with the urgency of this contention. The first section of the memorandum contains a fair and accurate exposition of the law relating to the secrecy of grand jury proceedings, the use of grand jury testimony for refreshment purposes, the discretion of the trial court when grand jury testimony is used for refreshment purposes, and the right of the defense to inspect. How this legal data prejudiced appellant is beyond our comprehension. It is clear from the conference relating to the use of the grand jury testimony that counsel for appellant were fully cognizant of all legal principles stated in the memorandum. Moreover, no claim is now made that the legal memorandum contained any misstatements of the law.

The second section of the memorandum contains the names of eleven witnesses who testified before the grand jury, whom the Government expected to call as witnesses

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6. The record belies appellant's assertion that it was uninformed as to the contents of the memoranda until the appeal was perfected. Early in the trial, immediately after the Government had called a witness, the court, out of the hearing of the jury, stated to counsel:

> "In accordance with our practice on the Grand Jury notes, the Government has handed me a memoranda of some nine points."

The court then elaborated upon three of the points and gave specific instructions to Government counsel in regard to use of the witness' grand jury testimony for refreshment purposes. Counsel for the defense made no claim of surprise nor request to examine the memoranda referred to by the court.

in the trial. It stated the facts that the Government hoped to elicit from the witnesses, the page reference to the specific material Government counsel intended to read, page references to other material relating to the same subject, and short statements explaining the context of the material.

Again, we are unable to find any prejudicial material in this section of the memorandum. It is evident that the memorandum was designed to aid the court in familiarizing itself with the grand jury transcript, prior to refreshment. According to statements made by the judge, the memorandum accomplished this purpose. But nothing emerges from the record to furnish any foundation for appellant's assertion that the memorandum "actually did influence the court."

The Court's Charge.

Appellant's numerous contentions of error are presented in reference to four specific parts of the instructions: (a) the summarizing and outlining of the evidence; (b) the instructions on the Sherman Act counts; (c) the instructions on the Robinson-Patman Act counts; and (d) the "general" charge to the jury.

Summary and Outline of the Evidence.

Appellant asserts that the court summarized and outlined the allegations of the different counts and the evidence favorable to the prosecution but did not similarly summarize and outline appellant's contentions and the evidence favorable to it; that the summary was one-sided and, therefore, prejudicial to appellant.

A Federal Judge, in a criminal case, is more than a moderator or umpire. He is not a "mere automatic oracle

of the law, but a living participant in the trial, and so as the limitations of his position permit should see that justice is done." *Rudd* v. *United States,* 173 F. 912, 914 (8 Cir. 1909). The judge may "assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia* v. *United States,* 289 U.S. 466, 469 (1933). See also, *Franano* v. *United States,* 310 F.2d 533, 537 (8 Cir. 1962); *Northcraft* v. *United States,* 271 F. 2d 184, 188-189 (8 Cir. 1959).

To be sure, the judge must not become an advocate for either party. *Stoneking* v. *United States,* 232 F.2d 385, 389-390 (8 Cir. 1956), and cases there cited. "[S]ince a trial judge's influence upon a jury is necessarily of such great magnitude, [he] should exercise care and discretion in expressing an opinion so as not to mislead or, in effect, to destroy the jury's right as the sole arbiters of all fact questions." *Franano* v. *United States,* supra, at 537, and cases there cited. As stated by Judge Hand, "There is no inevitable necessity in a criminal case that the judge shall state the evidence in his charge—'marshal' it, as it is called in England." *United States* v. *Gillilan,* 288 F.2d 796, 798 (2 Cir. 1961). If the court does undertake to review the facts for the purpose of aiding the jury, it must do so in fairness to both sides. *Cline* v. *United States,* 20 F.2d 494, 496 (8 Cir. 1927); *Boatright* v. *United States,* 105 F.2d 737, 739-740 (8 Cir. 1939), and *Benes* v. *United States,* 276 F.2d 99, 103-104 (6 Cir. 1960).

The court's charge was exhaustive and comprehensive. Almost five hours were required to deliver it. Apparently the court had prepared an outline of all the pertinent portions of the evidence which it felt should be called to

the jury's attention. As the final argument of counsel progressed, the court eliminated from its outline evidentiary matters that were covered by counsel.[7]

We, of course, must consider the instructions as a whole in determining whether a particular statement conveys an erroneous impression to the jury. *Beatrice Foods Co.* v. *United States,* supra, at 47; *Northcraft* v. *United States,* supra, at 189: *Stoneking* v. *United States,* supra, at 389.

We have carefully read the entire charge and have focused our attention particularly upon those portions which appellant claims exceeded the bounds of propriety. The judge did not emphasize and unfairly comment upon evidence favorable to the Government. The court expressly informed the jury:

> "I want to say in connection with the specific counts at this time that I do not intend to exercise the power vested in a trial judge in the Federal system to make any comment upon the evidence or upon the testimony of any particular witness. That is your job. It is your job to make judgment of the facts in this case. I will make reference to the fact that my outlines do not constitute a comment or indicate in any way feeling that I may have as to the testimony of any witness that has been on that witness stand."

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7. At the outset of the instructions, Judge Oliver informed the jury that:

> "• • • the arguments of counsel in this case focused and directed attention to many of the facts and circumstances upon which their respective arguments were based, and the specific references to times and to places and persons and events has reduced greatly the amount of time that will be required by me so far as making any outline of the evidence to you is concerned. • • • this jury received an excellent review of all the evidence by the highly competent counsel representing all the parties in this case."

The judge assiduously adhered to his stated intention. He refrained from commenting upon, interpreting or drawing any conclusions from the evidence. It is true that, in instructing on each count, the judge did, upon occasion, direct the jury's attention to certain evidence and he did remind the jury of certain incidents which were established by undisputed evidence, but we find no unfairness in his statements. At no time did the judge become an advocate for the Government or attempt to usurp the function of the jury. On the contrary at the outset of the charge, the jurors were told: "* * * you are the sole judges of the facts in this case. * * * You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." After directing attention to a meeting attended by defendant, Wise, the court instructed: "You must determine what was said, who said it, determine what testimony you are going to believe. * * * These are the types of questions relating to the conflict in the evidence that you must decide in your determination of the factual issues presented by the 1957 market situation relating to Count 11." In concluding its charge, the court stated: "Remember that our quest is for truth and to see that justice be done. Justice is not done unless you follow and apply the law to the facts as you find them in this case."

We are convinced that the portions of the instructions under attack comport with the legal standards enunciated, supra. The fact that appellant was acquitted on Counts 14 and 15, in regard to which the court's references to the evidence were no different, belies the assertion of one sidedness and prejudice. The acquittal on these counts demonstrates that the jury was fully aware of its reponsibility and that it decided the case in accordance with its view and understanding of the evidence.

Instructions on Sherman Act Counts.

Relying principally upon *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911 (5 Cir. 1952), and *Poller* v. *Columbia Broadcasting System, Inc.,* 284 F.2d 599 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962), appellant asserts error because the court refused to instruct that a corporation cannot be found guilty of conspiring with its own officers, employees or agents. The short answer to this is that the instructions that were given included the matter covered by the refused instruction. In clear and unambiguous language the court required the jury to find, as a prerequisite to any verdict of guilty, that the defendant or defendants had conspired with others—competing dairies or distributors. That, of course, was the theory upon which the case was tried. The Government never contended that the crimes charged rested upon a conspiracy between National and its own employees. Inasmuch as the instructions given properly declared the law, no prejudice resulted from the failure to give the offered instruction.

Appellant further contends that the court erred in instructing the jury that a mere "unity of purpose" would justify the finding of an unlawful conspiracy. A sufficient answer is that no exception was taken, as required by Rule 30, F.R.Cr.P. Even if we were to assume (which we do not) that the statement was erroneous, the error was not so prejudicial as to require application of Rule 52(b), F.R.Cr.P. (plain error). The fact is that the instructions which submitted the Sherman Act counts, considered in their entirety, correctly declared the law and provided a proper guide for the jury in its deliberations.

Appellant advances other complaints of a minor nature about the instructions as they relate to the Sherman Act

counts. These complaints have been considered and are found to be lacking in substance.

Instructions on the Robinson-Patman Act Counts.

Appellant attacks the charge which submitted the Robinson-Patman Act counts on several grounds. We have carefully considered all of them.

It is manifest from statements made by Judge Oliver, during the course of his consideration of the over-all charge that he intended to give, that he was thoroughly familiar with the Supreme Court's opinion in *National Dairy Products,* supra. It is likewise evident that the judge carefully framed the instructions to comply with the principles enunciated by the Supreme Court. Thus, at the outset of the charge, he instructed:

> "When the Congress passed Section 3 of the Robinson-Patman Act, it condemned sales made below cost if it should be determined as a matter of fact that such sales were made, in the language of the statute, at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> • • • • • • • •
>
> "The Congress required proof of a predatory intent on the part of one charged with violation of Section 3 of the Robinson-Patman Act.
>
> "The law requires that proof of such an intent, proof of an intent to sell at unreasonably low prices in furtherance of a purpose of destroying competition, be made beyond a reasonable doubt. Basically, Section 3 of the Robinson-Patman Act is directed at business conduct designed to destroy competition.
>
> "Now, of course, neither Section 3 of the Robinson-Patman Act nor any other law of Congress can be evaluated or applied in the abstract. It is quite clear that Section 3 is not to be applied to hold that every

> sale that is made below cost is to be determined to be a sale made at an unreasonably low price for the purpose of destroying competition or eliminating a competitor."

The jury was further specifically instructed that, as a prerequisite to a verdict of guilty on each of the Robinson-Patman Act counts, they were required to find "beyond a reasonable doubt that National sold below cost and that such prices were unreasonably low for the purpose of destroying competition," and the jury was also required to make "a finding of predatory intent beyond a reasonable doubt and find that the sale below cost was unreasonably low beyond a reasonable doubt."

Appellant complains in particular because the court submitted the fully distributed cost theory to the jury. Attention is focused upon Count 13, the contention being that, as to this count, "it's [National's] challenged price in Kansas City was *above* its cost of production. * * * Accordingly, as to this count there was a clear failure of proof of an essential element of the offense charged * * *." The cost issue was submitted in the following manner:

> "In this connection, the Government urges that the sales were unreasonably low because they were below National's total costs, calculated on an average unit basis for that product, usually a half gallon of homogenized milk in a paper container * * *. Defendants dispute this and contend that their costs must be limited to the cost of raw milk plus the cost of paper containers. It is for you to decide whether or not the prices National charged were below cost and were unreasonably low. * * * Of course, the question of whether or not the low price charged is unreasonable will also depend upon the purpose behind it about which I have attempted to instruct you fully."

We do not believe that there was error in this submission. Although appellant's price, relating to Count 13, was above direct cost, concededly, it was below fully distributed cost, and since we determined, supra, that the record contains ample evidence of predatory intent, it was a fact question, properly submitted to the jury, whether sales below *fully distributed* costs were "unreasonably low" and were made for the purpose of destroying competition or eliminating a competitor.

General Charge.

Finally, appellant contends that the court erred in its "general" charge to the jury.

The assertion that the court did not advise the jury that appellant's guilt must be established beyond a reasonable doubt is patently frivolous. Throughout the charge, the jury was instructed as to the standard to be applied. Indeed, at the conclusion of the charge, Government counsel complained that "the court has overly stressed the reasonable doubt aspect in the giving of its instructions * * *."

The instruction relating to liability of National for the acts and declarations of its agents properly declared the law. *Egan* v. *United States,* 137 F.2d 369 (8 Cir. 1943), cert. denied 320 U.S. 788 (1943); *Continental Baking Co.* v. *United States,* supra.

Likewise, the court properly instructed that National was responsible for the acts of Chapman Dairy and its agents prior to December 31, 1956, if the jury further found that National dominated and controlled the operations of Chapman. We have heretofore demonstrated at some length that there was substantial evidence to sup-

port a finding that Chapman's operations were in fact completely dominated and controlled by National.[8]

Further discussion of the alleged errors in the instructions would add nothing. It is sufficient to say that a studious examination of the instructions, in context, fails to reveal any prejudicial defects therein.

The Court's Attitude.

Appellant asserts "the Court's attitude was highly prejudicial," and "[w]hile appellant does not contend that the trial court intentionally prejudiced its defense, the judicial acts * * * described were in fact 'calculated' to, and did, deprive appellant of a fair trial."

The persistence and zeal with which counsel present the claims of prejudicial conduct contrasts sharply with their failure to exhibit concern about the asserted unfairness during the trial. The undisputed fact is that not once in the protracted trial, requiring a countless number of rulings by the court, did counsel even intimate that they believed appellant was the object of judicial prejudice.[9] Cf. *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F.2d 46, 55-56 (8 Cir. 1958).

The issue of prejudice was first raised in the motion for new trial. Yet, in oral argument on the motion, Mr. Chadwell, chief counsel for appellant, stated:

> "I want to repeat very sincerely, Your Honor, what Mr. Purcell has said, that is, by anything that we

8. See our consideration of appellant's challenge to sufficiency of evidence to support conviction under Count 1.

9. Appellant did object to the court's ruling during cross-examination of witness Theno. The "Theno incident" is set out in full in the trial court's opinion denying the motion for new trial at 231 F.Supp. 663 (1964).

> have said in our briefs or anything that he has said or anything I will say, we want to make very clear in the record that we do not wish Your Honor to understand that we are in any way indicating a belief that Your Honor was other than sincere and honest in your rulings from beginning to end in this trial. We don't think that at any time you were out to get us or out to get the defendants, but you tried to preside in this case fairly. We don't say anything else, and I want the record to make that clear."

As reference to Judge Oliver's post-trial opinion, 231 F.Supp. 663 (1964), will disclose, he considered the claims of judicial unfairness at length and demonstrated beyond any doubt that appellant's assault upon his judicial demeanor is wholly unwarranted and completely without basis.

The failure to object or take appropriate exceptions notwithstanding, we have examined the contentions in light of the plain error rule [Rule 52(b), F.R.Cr.P.], and find that, without exception, they are lacking in substance. Judge Oliver presided over the long and hard-fought trial with judicial poise and commendable fairness. This record simply does not lend any support to claims of judicial intemperance or irritation. The judge did not limit or restrict appellant's right to examine witnesses; he did not disparage appellant's defense; his questioning of witnesses was not prejudicial, and his rulings on evidentiary questions did not favor the Government. In short, we conclude that appellant's claim of judicial misconduct borders on the frivolous.

Rulings on Evidence.

Appellant lists three basic contentions of error in regard to the reception of evidence: (1) that hearsay declarations were improperly admitted; (2) that two hearsay

documents were improperly admitted; and (3) that evidence of appellant's corporate size and market power was improperly admitted.

Hearsay Declarations.

It is well settled that the statements of conspirators are admissible against all members of a conspiracy so long as there is other independent evidence showing that there was, in fact, a conspiracy between the declarant and the others. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917); *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 116-117 (1948). The trial court properly instructed the jury as to the evidentiary worth of such statements.[10]

Appellant insists that, while statements of defendant co-conspirators may be admissible, statements of non-defendant co-conspirators are not admissible. This contention has been rejected by the case of *Clune* v. *United States*, 159 U.S. 590, 593 (1895) and, more recently, by the case of *Esco Corp.* v. *United States*, supra, at 1008-1009.

Appellant also objects to the admission of statements

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10. The judge's instruction to the jury was in part as follows:

"I instruct you that acts or declarations of any alleged co-conspirator, or conspirators, may not be considered by you until and unless you find beyond a reasonable doubt that a combination and conspiracy had in fact been formed and the alleged conspirator or conspirators are identified with it.

• • • • • • • •

"It would be a matter of first order in your consideration of any of the separate and particular Sherman Act counts for you to inquire in each instance whether or not the Government has proven that a particular combination and conspiracy existed by independent evidence and beyond a reasonable doubt before you are warranted in considering any actions or declarations by any alleged co-conspirator, purportedly made pursuant to that particular conspiracy."

made by others, neither co-conspirators nor employees. We are convinced, after careful consideration of the testimony complained of, that the statements were properly admitted and did not fall within the hearsay exclusionary rule.

Hearsay Documents.

Appellant, on the grounds that they are "rank hearsay," claims that the trial court erred in admitting two of the Government's exhibits. The record shows, however, that a proper foundation for their admission was laid. Even assuming, which we do not, that two documents had been improperly admitted, it is difficult to comprehend that, of the more than 600 exhibits received, two documents containing facts which were substantiated by proper testimony of many witnesses, could have been prejudicial to appellant.

Evidence of Appellant's Corporate Size and Market Power.

Appellant contends that evidence of its corporate size and market power was irrelevant, immaterial and prejudicial. While it is well established that size is not an element of the offense of conspiracy under § 1 of the Sherman Act, corporate size can be relevant, especially when conspiracy to cut prices is charged. *United States* v. *Socony-Vacuum Oil Co.*, supra, at 239. However, the trial court properly instructed the jury that corporate size and power was not to be considered as evidence of conspiracy under the Sherman Act counts. Appellant was not prejudiced nor was the admission of evidence of its corporate size irrelevant and immaterial under the Sherman Act counts.

Evidence of corporate size and power was even more relevant to the Robinson-Patman Act counts. In *United States* v. *National Dairy Products Corp.*, supra, the Supreme Court quoted from *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120, 119 (1954):

> "'Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business' through programs in which 'profits made in interstate activities would underwrite the losses of local price-cutting campaigns.'" (at p. 34)

The record discloses that National's Kansas City milk division lost a substantial sum of money during the period charged in the indictment. Evidence of National's overall size and financial power was directly relevant to show National's ability to underwrite and subsidize any local plant losses.

Other complaints about the admission and exclusion of evidence are made by appellant. The complaints are too numerous to be discussed individually without greatly extending this already lengthy opinion. Suffice it to say that we have carefully examined each of them and conclude that the court's rulings were not prejudicial.

In conclusion, the following observations are relevant. Both the Government and appellant were represented in the district court and on appeal by highly competent and skilled advocates. This prosecution has produced a history of every conceivable motion and numerous legal memoranda. The case has twice been to the Supreme Court. From the filing of the indictment to the filing of the notice of appeal fourteen volumes of "pleadings" have been amassed. In such a hotly contested and protracted legal battle, mistakes do occur. "The human element cannot be eliminated from lawsuits." But, as always, the crucial question is, were there any mistakes or errors of a prejudicial nature? We conclude there were not.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,734
September Term, 1964

National Dairy Products Corporation,
Appellant,

vs.

United States of America

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 27, 1965.

Order entered in accordance with Opinion:

[ROBERT C. TUCKER]
Clerk, U. S. Court of Appeals for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1965

No. 17734

National Dairy Products Corporation,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 23, 1965.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIONAL DAIRY PRODUCTS CORP., and RAYMOND J. WISE,
Defendants.

No. 20542

MEMORANDUM AND ORDER

This case pends on the separate motions of defendant Wise and defendant National for judgment of acquittal, notwithstanding the verdict and; in the alternative, for a new trial as to Counts Eleven, Twelve and Thirteen, and on the similar separate motion of defendant National in regard to Counts One through Ten.

The motions that relate to the Kansas City counts, (Counts Eleven, Twelve, and Thirteen) are identical except that paragraph 16 of defendant Wise's motion alleges in addition that we erred in refusing to sever defendant Wise and accord him a separate trial on the Kansas City counts for the reason that the introduction of evidence against defendant National on all the counts prevented defendant Wise from obtaining a fair trial in connection with the only counts in which defendant Wise was charged.

Defendant National's motion in regard to the distributor counts (Counts One through Ten, inclusive) contain many paragraphs that duplicate the allegations made in regard

to the Kansas City counts and, except for naming different witnesses and different exhibits, follows the same general pattern of the separate motions that relate to the Kansas City counts.

The reasons assigned in all the pending motions, with one exception to be noted, are the reasons that careful lawyers usually assign in such motions in order that all questions of possible error be preserved for appellate review. For example, paragraphs 1 through 3 of defendant National's Kansas City counts motion are directed to our charge to the jury; paragraphs 4 through 9 relate generally to our rulings on questions of evidence; paragraph 10 and 11 are directed to the use we permitted and the procedure we followed in connection with the Grand Jury transcript; paragraphs 12 through 15 preserve defendants' various contentions concerning our refusal to sever and to grant separate trials, both in regard to the two defendants and in regard to the particular counts of the indictment; paragraphs 17 through 19 allege in general and usual fashion that the verdict is contrary to the weight of the evidence, that it is not supported by substantial evidence, and that it is contrary to the law; paragraph 20 alleges that we erred in denying the motion for acquittal filed at the conclusion of the Government's case and again at the close of all the evidence; and paragraph 21 alleges that we erred in overruling defendant Wise's motion to dismiss Count Thirteen.

Paragraph 16 of defendant National's motion, which we noted above as an exceptional allegation, reads as follows:

> "16. The defendants were substantially prejudiced and deprived of a fair trial by reason of the comments and rulings by the Court, the restrictions placed by the Court upon cross-examination and presentation of evidence by defendants, and by the attitude of the Court toward defendants, defendants' evidence, and defendants' counsel during the trial."

The allegation just quoted is made in identical language by both defendants in regard to each count to which their separate motions are directed. (See paragraph 17 of defendant Wise's motion and paragraph A.11 on page 3 of defendant National's distributor motion directed to Counts One and Two. And see also paragraphs B.1 on page 3, C.1 on page 4, D.1 on page 4, and E.1 on page 5 of National's distributor motion where paragraph A.11 relating to Counts One and Two is incorporated by reference as being applicable to all of the other distributor counts).

In spite of the over 1000 pages of the post-trial briefs that have been filed, we do not believe it necessary for us to write an extensive memorandum and opinion in support of our action on the pending motions. In connection with the major contentions presented, the transcript reflects our particular rulings and the reasons upon which those rulings were based. We have studied the briefs filed; we have read the authorities cited; we have again considered each of the over 7300 pages of the transcript of the trial proceedings and are satisfied that the defendants had a fair trial and that defendants' contentions are not tenable.

In our memorandum and order of May 1, 1963, prior to trial, we ruled defendant Wise's motion for a separate trial. We there cited and applied what we believed are the controlling authorities. At several points during the trial we reviewed the question of whether Rule 14 should be invoked.* We then determined that no necessity existed for its invocation. We are still of that view.

In like manner, our reasons for refusing to dismiss Count Thirteen are fully stated in another memorandum and order dated May 1, 1963. Our reconsideration of that question does not incline us to change our view of that question.

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*See Tr. 2846 and Tr. 2890 for examples of record.

Both at the close of the Government's case in regard to the Kansas City counts and at the close of the Government's case in regard to the distributor counts, we called for briefs and heard extended oral argument on the question of the sufficiency of the evidence. The substance of the defendants' theory then presented is substantially the same as the substance of most of the arguments presented in more elaborate fashion in the post-trial briefs in support of defendants' motions for acquittal. See Tr. page 2764 to 2826, and Tr. 4605 to 4672. On pages 2828 to 2839 and on page 4672 to 4677, I expressed my views concerning the questions presented. My review of the entire record and my study of the briefs and the authorities cited does not convince me that the motions for acquittal should have been sustained.

A comparison of the arguments made at trial with the arguments made in the post-trial briefs, of course, reflects that the defendants in this case, after verdict, are more prone to indulge in vindictive and expletive language against the Government witnesses and the Government itself than they did in the arguments made during the trial. But we must, of course, judge the sufficiency of the evidence on the basis of the testimony as actually given. The post-trial argument that there was "nothing but suspicion as a basis for a finding of conspiracy" (page 41 of National's acquittal brief), for example, was made to and rejected by the jury (Tr. 6939, 6944-6945). We have determined that there was substantial evidence to support the verdict. We must and shall therefore rule that defendants' motions for acquittal notwithstanding the verdict must be denied.

We turn now to the alternative motions for new trial. In that connection we have again reviewed our charge. We obviously thought it fair when we gave it, or we would not have given it. We sought the aid and assistance of counsel

early in the case and repeated our request for assistance at frequent intervals thereafter (see Tr. 2626, 2837-2839, 4676-4677, 5815-5822, 6585-6588). We used the assistance proffered and express our appreciation to counsel for their efforts.

We have reviewed our charge in light of our restudy of the transcript and are convinced that defendants' complaints do not go to matters of real substance.

In regard to defendants' comments concerning the outline of the evidence that had been adduced by both sides in connection with the particular counts, we have noted with some interest the suggestion made by Edward Bennett Williams in the panel discussion on The Problems of Long Criminal Trials held at the Judicial Conference of the Second Circuit last September as reported in 34 F.R.D. 155, at page 187. Mr. Bennett suggested:

> "I think that the jury can best be helped if the legal abstraction is superimposed on the facts in evidence and the judge points out to the jury the possible points of incidence. Now, what I'm suggesting is that in these cases the courts exercise their right to review the evidence and, if necessary, to comment on it. I suppose this sounds most unorthodox coming from a defense lawyer because generally when a trial judge suggests that he's going to talk about the evidence trial lawyers on the defense side of the table are struck with palsy, but I have enough faith in the objectivity of the trial bench to believe that they can be helpful to juries in delineating the evidence against a specific defendant and that no prejudice will inure to defendants from following this practice."

We did not believe that justice required that we comment on the evidence adduced by the parties. We so advised the jury (Tr. 7117). We did, however, believe that an outline of the evidence in regard to each count would focus attention

on the questions of fact that the jury was required to decide. We are confident that our repeated reference to what was said in regard to the outline and its purpose (Tr. 7061, 7117, 7149, 7155, 7160) and our closing instruction that the jury should not regard anything said in the instructions as suggesting what we would do if we were acting as a juror (Tr. 7211) could not have been misunderstood or misconstrued.

Of course, we agree with Judge William B. Herlands' statement as a member of the same panel to which we have made reference, that "it is much easier to love justice than to administer it," (l.c. 175 of 34 F.R.D.). But we do not share defendants' evident agreement with the idea that a defendant has only a 50-50 chance of obtaining a fair verdict in a criminal trial and that we fool ourselves if we believe that a jury of laymen can listen to a three-hour oral charge and retain it (see footnote 7 on page 12 of Defendant National's acquittal brief).

At the close of the Government's evidence on the Kansas City counts, we gave an interim charge to the jury in order to provide a sharp separation between the evidence received against both defendants in regard to the Kansas City counts and the evidence that would immediately be adduced against only defendant National on the distributor counts (Tr. 2871-2885).

Counsel for the defense, after preserving defendants' position in regard to separate trial (Tr. 2845-2850, 2877, 2888-2889), and after stating that our statement to the jury as to how the distributor counts evidence was and was not to be considered (Tr. 2878-2885) was "a fair statement," commented that "I just don't think it is humanly possible for the jury to keep all this vast amount of evidence separate in their minds" (Tr. 2891). In further argument, defense counsel reiterated that "I think it is just physically

impossible, mentally impossible to keep this straight and to follow the rule of law [as] to each count. . . . " (Tr. 2895).

Counsel's discussion of the obvious problem that protracted cases present to the administration of justice prompted us to make the following comment:

> "THE COURT: I would make this comment here on the ability of a juror to keep straight [in] this, and I would add, any other anti-trust case. All of this proceeds on the assumption that the guaranties of the Sixth Amendment to a jury trial is calculated to be the best system for the ascertainment of fact.
>
> "There is some slight difference of opinion on the subject as to whether this is the best instrument for the ascertainment of fact, but the presumption and the theory upon which we work is that it is, and I am quite sure that you share with me the system works almost in spite of its unwieldiness, if the great experience of other lawyers and other courts are intelligently applied to the particular situation at hand.
>
> "So we must move from the major assumption that a jury in this and in all cases can intelligently follow instructions from the Court." (Tr. 2898-2899)

The substance of that trial comment, of course, assumed that the interim instruction, as given, was a proper instruction, and it also assumed that the Court would give additional proper instructions throughout and at the end of the trial of the case. We have considered every charge made and believe that they were proper.

We believe now, as we believed at the time of trial, that the constitutional system of trial by jury is a viable one, even in protracted cases, and that the presumption that juries can and do follow the instructions of the trial judge does not rest upon myth.

The jury returned verdicts of Not Guilty on Counts 14 and 15 (Tr. 7339). We believe a quite convincing argument

could be made that such action is consistent only with the idea that the jury was able to follow, and that it did in fact follow, the instructions given them by the Court. We cannot think of any other reasonable explanation of the jury's action.

After full and careful consideration, we are convinced that the jury was fairly charged in accordance with the law as we understand it, and that the administration of justice requires that we not overturn the verdict of the jury for any of the reasons urged by defendants.

Both in their written brief (page 161) and at post-trial oral argument, defendants suggest that we refused to exercise any judicial discretion in connection with the use of the Grand Jury transcript. When defense counsel at oral post-trial argument suggested that "Your Honor placed it upon us, upon the repeated statement that you didn't have the discretion to go beyond that" (page 30-31 of March 14, 1964 transcript) we suggested that what we thought that what we had said at trial was that "I had discretion but did not choose to exercise it and that . . . resulted in the tentative experiment in this whole area that is fully set out in the record" (page 31 of March 14, 1964 transcript). We further suggested that we had not felt any "strictures in this area" at the time of trial and that we thought that the record would so reflect (page 31 of March 14, 1964 transcript).

Our examination of the trial transcript reflects that our recollection was not inaccurate. When the use of the Grand Jury transcripts came up first (Tr. 422), we heard the arguments of counsel in chambers and then stated our view of the law and the procedure we would follow (Tr. 432-443). The record shows that we then indicated that it was our view that the controlling cases related to the question of whether "a trial judge has abused his discretion" (Tr. 432)

and that we then outlined the procedure that we felt should be followed (Tr. 433-443).

At the time we ruled the first actual use of a Grand Jury transcript we stated that we were "going to experiment with this procedure, which I think is not only approved, but at least by implication recommended" (Tr. 447) and that if "complete fairness is not maintained to all parties" I would later consider determining "a different procedure;" but that, in connection with the first witness, I thought "we would get a bit of experience how it works" (Tr. 448).

We advised counsel that they should "feel perfectly free to renew [their] request for any different procedure" (Tr. 448). We emphasized that we thought that we could "maintain an even keel by experimenting with the present procedure" (Tr. 448). Defendants' counsel, of course, on various occasions throughout the trial, preserved his contention that a defendant has an absolute right to be furnished a copy of the Grand Jury transcript (Tr. 612, 5521, 5590-5591, 6357, and 6362). And on March 11, 1964, a bit late for trial use, counsel filed a supplemental memorandum on the grand jury transcript question.

The supplemental memorandum most recently filed does not cite a single page of the transcript of the trial proceedings. The particular pages of the transcript cited by counsel for the defendant in their regularly filed post-trial briefs do not support defendants' assertion that we believed and acted on the idea that a trial court had no judicial discretion in this area.

Nor do those or any other pages of the transcript indicate that counsel for the defense thought, at the time of trial, that we were under the impression that we lacked discretionary power. We believe that we must rule this case upon what is shown by the record and not on any other basis. We believe the procedure established and followed in regard

to the Grand Jury transcript was fair and within our discretionary power as defined by our controlling courts. We shall not disturb our trial rulings.

Two other paragraphs of defendants' post-trial motions raise questions of alleged error preserved at the time of trial. Both relate to our action in denying motions for mistrial in connection with particular counts of the indictment.

Paragraph 9 of both defendant National's and defendant Wise's motions for mistrial of Count Eleven alleges that we erred in connection with the Adams-Olson conversation related by the witness Adams.

That motion was made the day following our instruction to the jury concerning their duty to disregard Mr. Adams' testimony as to what Mr. Olson had said to him (Tr. 1831-1832). At the time we denied that motion we stated that we were of the opinion that not even a close question of law was presented (Tr. 1840). We are still of that view. We must proceed on the basis that the jury followed our instructions. See *Opper* v. *United States,* 348 U.S. 84, 95 (1954), and *Delli Paoli* v. *United States,* 352 U.S. 232, 242 (1957).

Paragraph A.5 on page 2 of defendant National's motion directed to Counts One and Two alleges that we erred in denying defendants' motions for mistrial. Two such motions were filed. No particular point is made about either in defendants' post-trial briefs but we must discuss both because they do relate to errors claimed at the time of trial and are specified in defendants' post-trial motions.

Defendant National's first motion for a mistrial of Count One was filed in connection with the Chapman Dairy issue. That motion was filed at 1:50 p.m. on Saturday, July 13, 1963, the day following the first discussion of Chapman Dairy.

The first mention of the existence of any problem or real issue concerning Chapman Dairy was made by counsel for the defense at a bench conference on Friday, July 12, 1963 (Tr. 3272-3282). At that time, the case had been in trial for one month and twenty actual trial days had been completed. We denied defendant's motion for mistrial as the first order of business the next Monday morning, July 15, 1963, for the reasons we fully stated of record (Tr. 3427-3454).

Defendants' post-trial briefs do not so much as mention our ruling on that motion. We have, however, reviewed our action denying defendants' first motion for mistrial of Count One and have determined that our ruling was correct.

Defendant National's post-trial briefs do not focus any particular attention on the only other motion for mistrial made in connection with Counts One and Two. That motion for mistrial was made in connection with an incident that occurred in connection with the cross-examination of Government witness Theno. But passing reference is made in defendants' post-trial briefs to the fact that defendant National had even made such a motion (see bottom of page 206 c of defendant National's new trial brief). The legal question of whether we erred in denying that motion is not specifically discussed in defendant National's post-trial brief.

We nevertheless believe it necessary to review the record concerning the Theno incident in somewhat greater detail than we did in connection with the Chapman Dairy problem, because the Theno incident was cited at oral argument as an example of why defendants' post-trial attack upon our fairness should not be considered as "a hindsight, after-the-game-was-over, attack on Your Honor" (page 16 of March 16, 1964 transcript of proceedings).

It is our judgment that a full review of the Theno incident, which was the only instance in which defendants requested any ruling of the trial court during the course of the trial on the basis of any alleged demonstrated prejudice, will also serve a useful introductory purpose for our required discussion of the allegations made in Paragraph 16 of defendant National's post-trial motion.

It must be remembered that counsel for the defense, at oral argument, told us that the Theno incident provided the "best answer" that they could give as to why they did not say anything during the trial about what they say for the first time in their post-trial motions and briefs concerning the allegedly highly prejudicial attitude we allegedly demonstrated against the defendants and defendants' counsel on a daily basis (see pages 16 and 17 of March 14, 1964 transcript). We now review the record concerning the Theno incident.

Mr. Theno was called to the stand as a Government witness (Tr. 3392). Early in his cross-examination, which commenced on page 3408 of the transcript, Mr. Theno was asked if he did not recall being quoted in a trade publication from which counsel commenced to read before the article had been introduced in evidence (Tr. 3410).

Government counsel objected (Tr. 3410). We asked to see a copy of the article which had not been furnished us (Tr. 3410); we experienced a little difficulty in getting to see it (Tr. 3411); were finally furnished a copy (Tr. 3412); and, as we were looking at the article, counsel continued to talk at each other (Tr. 3412). We therefore instructed counsel for both sides to make their remarks to each other out of the presence of the jury and instructed them to approach the bench (Tr. 3412). By that time it had become apparent that we would once again be required to straighten out another facet of what proved to be about

the only really troublesome evidence problem encountered throughout the trial.

At the bench conference we advised counsel, out of the hearing of the jury, that our "ruling in connection with any effort to use this article stands exactly in the same category as I have attempted to consistently rule in regard to statements attributed to people in newspaper articles, to testimony in a Congressional record, or in any other document other than that which this witness—or, rather the particular witness on the stand, adopts as a statement he made at a particular time" (Tr. 3413-3414). (For instances reflecting earlier instances of the same general problem that had occurred before the Theno incident to which we were then making reference, see Tr. 758; 1170-1173; 1686-1688; 1692-1693; 1917-1919; 1948-1968; 1984-1987 and 2458-2466).

The colloquy at that bench conference (Tr. 3413-3422) reveals that counsel for the defense had intended to do exactly what he did do (Tr. 3417); that he had not visualized that a magazine article fell in the same area as a newspaper article (Tr. 3417-3418); that although we recognized neither side was particularly happy with our general ruling as to how hearsay documents were to be handled (Tr. 3418); we stated that we, nevertheless, "must insist that counsel proceed in accordance—both counsel, on both sides—with the rules that are laid down here" (Tr. 3420).

At that point, counsel for the defense advised us for the second time that day that he did not feel well and requested that we consider recessing until Monday (Tr. 3420; see Tr. 3421 for reference to the earlier request). We adjourned court until Monday (Tr. 3422).

On the following Monday, after we had ruled on two defense motions, one filed at 1:50 p.m. on the preceding Saturday, and the other filed at 9:10 a.m. on that day

(Tr. 3427-3454). Mr. Theno was recalled for further cross-examination (Tr. 3455). The magazine article was mentioned briefly on pages 3455-3456 of the transcript but inquiry into the detail of the article was not recommenced until page 3481 of the transcript. Examination concerning the article continued without incident up to page 3488 of the transcript. During that time the witness testified that a portion of the article did in fact refresh his recollection (Tr. 3484). Only three objections had been made by the Government during all of witness Theno's Monday morning cross-examination; we had over-ruled two and sustained one (Tr. 3461, 3463, 3482).

On page 3488, Mr. Theno was asked "Are you saying the article is wrong?" He answered: "I am saying I cannot be sure." Defense counsel then stated and asked:

> "Q. You can't remember. There was no reason at that time for you to tell this reporter, Mr. Leathers, the absolute truth about these matters, was there, Mr. Theon?"

The following then occurred:

> "MR. JINKINSON: Objected to, Your Honor, as being irrelevant and immaterial.
>
> MR. CHADWELL: [Mr. Purcell, not Mr. Chadwell, was conducting the cross-examination] Is counsel taking the position it is irrelevant whether he told the truth or not?
>
> MR. JINKINSON: I don't think, Your Honor—Mr. Chadwell knows that is not what I mean. That is improper.
>
> THE COURT: I will sustain the objection. You can ask him, Mr. Purcell, specifically as to any disagreement he may have, but this witness hasn't testified any differently than he has testified generally, and he admitted very freely that this has refreshed his recollection in particular instances.
>
> MR. PURCELL: I would like to approach the Bench, if Your Honor please." (Tr. 3488-3489)

At the bench conference, and out of hearing of the jury, the following took place:

"MR. PURCELL: I object to the remarks of the Court as unduly restricting the effect of my cross examination of this witness. I object to the Court in the presence of the jury characterizing this man's testimony. Perhaps the Court believes that the cross examination is ineffectual, it hasn't proved anything, that it hasn't proved inconsistent statements, but this is a hostile witness.

I think it is improper for the Court to vouch for this witness in the presence of the jury, to say to the jury, 'This man very fairly' stated this and that, that he has not said anything inconsistent with what appears in the article.

I think it is prejudicial to the defendant and I think it is highly improper for the Court, as the Court has done, to belittle our attempt at cross examination of hostile, adverse witnesses, and in the manner in which it was said to me.

If I had any effect on this cross examinatio. I submit the Court has discredited it.

THE COURT: Mr. Purcell, would you like for me to advise the jury at this point that what the Court says in sustaining or not sustaining an objection is not to be considered nor does it reflect any view I have as to this witness' testimony, and that the testimony of this witness must be judged and appraised by the jury?

I will be happy to give you that charge at this time if you want it, if it is your judgment that this would reflect adversely on what was—

MR. PURCELL: I think Your Honor's remarks clearly washed out the cross examination.

THE COURT: Let me know what you would like for me to do. Would you like for me to so advise the jury? I would be happy to do so.

MR. PURCELL: Yes, that is the least that should be done.

THE COURT: Very well, I will do that right now. (Tr. 3489-3491)

We then immediately instructed the jury as follows:

"THE COURT: Members of the jury, in connection with the exchange between Court and counsel, as evidenced just now, as is true in regard to any statement that the Court makes in ruling an objection by counsel for either side, you are again instructed, and you will be instructed still again in my final charge, that what the Court may say in connection with ruling an objection is not in any way to be taken as reflecting any view of a particular witness' testimony, and I will charge you again and reiterate throughout this trial that the judgment of the weight of the evidence and the credibility that you give a particular witness' testimony is your province alone, and not the Court's, and you are not to assume from anything that the Court may say in ruling objections, by any counsel, and particularly the objection that I have just now ruled, that I intend in any way to reflect any view as to what weight, what credibility, you should give to Mr. Theno, in particular, or any other witness in general.

Keep that in mind in connection with all witnesses and keep it in mind as far as Mr. Theno's testimony is concerned.

You may proceed, Mr. Purcell." (Tr. 3491-3492)

After that instruction, the cross-examination of Mr. Theno continued (Tr. 3492) and was concluded without incident (Tr. 3505); defense counsel made inquiry about several other statements quoted directly from the article (Tr. 3492 to 3496); the article was admitted in evidence over the Government's objection (Tr. 3496); the witness was turned back to the Government for re-direct examination (Tr. 3496); and after being passed back and forth for additional questions by both sides, was excused (Tr. 3505). Witness Sheehan was then called by the Government and his direct examination was completed before the noon recess.

After lunch, and at the start of the afternoon session, defense counsel, for the record, moved for a mistrial as to Counts One and Two, which we denied (Tr. 3538-3539).

When we inquired of defense counsel at oral argument as to why they did not say something at the time of trial about what they now say was our almost daily attitude "towards the defendants, the defense, our theories, and counsel during the trial" (page 16 of March 14, 1964 transcript), our question was answered by defense counsel's question: "What could we do about it?"

We suggest that the language used by counsel in the motion for mistrial of Counts One and Two in connection with the Theno incident could have been used during the trial as a model for motions that could have been filed in connection with other counts in the indictment to preserve any contention that we were almost daily reflecting an attitude of prejudice against defendants and their counsel.

Defendants' motion for mistrial of Counts One and Two made after the noon recess and our ruling on the motion made at that time reads as follows:

"MR. PURCELL: Mr. Jinkinson, Your Honor, may we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. PURCELL: Come now the Defendants and move for a—

THE COURT: Pardon me, would you let Mr. Purcell stand here?

MR. PURCELL—for a mistrial as to Counts 1 and 2 of the indictment because of the comments made by the Court during the cross-examination of the witness Theno. By so commenting, the Court, we feel, practically removed from the jury's consideration the question of whether or not this witness was telling the truth as to matters crucial to the question of defendants' guilt or innocence. In so commenting, we believe that the Court usurped its function in the trial of this case, which is to act as an impartial arbiter. We state that we are fully mindful of the fact that lay

jurors are duly and properly impressed by the comment and attitude of the trial judge, particularly in the Federal Court, and we further state that the comments of the Court prejudiced the defendant and such prejudice has not and cannot be removed by any cautionary instruction given to the jury by the Court.

MR. JINKINSON: I think it sounds like the same motion made this morning, only know it was made after the Court gave the cautionary instruction which the Court asked if counsel wanted. Counsel wanted it and the Court gave it to him. I don't see how the instruction could be any more fair than it was and certainly it didn't help the Government any, I will say that. The Government was objecting to it because counsel wanted it.

THE COURT: Well, I don't think it is any waiver of the point this morning, although I will overrule the motion."

We think the foregoing review of the record states the detail of the Theno incident from beginning to end.

On the basis of that review and our personal recollection of the Theno incident at the time of trial, we do not believe we erred in refusing defendants' motion for a mistrial of Counts One and Two.

Nor do we think that the Theno incident adds any weight to defendants' blanket attack upon this Court, the matter to which we now turn. We refer, of course, to the allegations contained in paragraph 16 of defendant National's motion.

Counsel for the defendants have made clear that in making their post-trial charge that our consistent attitude was highly prejudicial to the defendants they "do not contend that the Court intended to prejudice the defendants during the course of the trial"; they suggest that they "are certain that the Court felt that he was impartially presiding over the trial of this case" (page 201 of defendants' new trial brief). At the time of oral argument, in somewhat similar fashion, Mr. Chadwell opened his argument with the following statement:

"I want to repeat very sincerely, Your Honor, what Mr. Purcell has said, that is, by anything that we have said in our briefs or anything that he has said or anything I will say, we want to make very clear in the record that we do not wish Your Honor to understand that we are in any way indicating a belief that Your Honor was other than sincere and honest in your rulings from beginning to end in this trial. We don't think that at any time you were out to get us or out to get the defendants, but you tried to preside in this case fairly. We don't say anything else, and I want the record to make that clear." (Page 17 of March 14, 1964 transcript)

Defendants do not attempt to cite the transcript as to when and where the alleged instances of unintentional but nevertheless demonstrated prejudice were supposed to have occurred on "practically every trial day" (see page 203 of defendants' new trial brief). But counsel's reiteration at oral argument makes clear that their assertion that "there wasn't a day that we went back to our office that we didn't feel—just didn't feel good about the treatment that we were getting here . . ." (page 16 of March 14, 1964 transcript) was not a slip of the pen.

To further complicate the problem of making any adequate review of the record, defendants state that the isolated portions of the record that they did quote in their post-trial briefs are "only illustrative, and not all-inclusive" (page 201 of defendants' new trial brief). We had no way of knowing during the trial that counsel felt as they now say they felt on practically every day of the trial. And, even after trial, we cannot guess what other alleged incidents are in their mind.

In raising the question presented by paragraph 16 for the first time after the trial was over, defendants state that "the comments and rulings of the court when viewed piecemeal might not appear to be prejudicial" (page 203 of defendants' new trial brief). But, defendants suggest that "when the cumulative effect is considered; when it is rec-

ognized that on practically every trial day an incident occurred, the jury necessarily received the impression that the court's attitude was adverse toward the defendants" and that "it is apparent that defendants were prejudiced and that they did not receive a fair trial". (page 203 of defendants' new trial brief).

The mere statement of defendants' post-trial position in regard to our allegedly prejudicial attitude makes it obvious that it is as difficult to come to grips with defendants' generalized blanket charge as it is to try to pick mercury from a broken thermometer off a tile floor.

The mere fact, however, that the defendants remained silent during the trial does not make it unnecessary for us to rule the question raised by paragraph 16 of National's motion and the other paragraphs of both motions that repeat that allegation.

The trial court in this case, as in any other case, is under duty to rule definitively on every point raised in a post-trial motion so that the appellate court neither has to guess nor search the record on its own account in order to ascertain what and why the trial court either sustained or denied any particular contention made by either party at or after trial.

Isolated portions of this record may not reasonably be read in support of any thought that this Court, either during the trial or at the present time, thought that it was being subjected to what Botein described as "The Gentle Art of Judge-Baiting", 29 N.Y. State Bar Bulletin 115 (I am indebted to Judge Herlands for the phrase and citation. See footnote 25 on page 175 of the panel discussion reported in 34 F.R.D.)

When the trial was quite well along, counsel for both sides led the Court to believe that it had not displayed any objective evidence of irritation toward either side in the case up to that point.

On June 27, 1963, one of counsel for the defense wanted to express his unhappiness with Government counsel and asked to approach the bench (Tr. 1672). After some not unheated discussion between counsel, defense counsel indicated that he also thought that we had shown "a good deal of irritation because we [defense counsel] were making the objection, and I think it is prejudicial to these defendants." (Tr. 1673)

We then made the following statement and request to counsel for both sides:

> "THE COURT: The record will show what it states. As far as any evidence of irritation, I think that is rather a broad statement. I am not irritated with counsel in this instance, nor have I been irritated at counsel in any other instance, and if counsel for either party feel that the Court has given any objective evidence of irritation at any place throughout this trial, I wish they would state it in the record right at this time as to where it happened."

Neither counsel made any response to that request either then or at any other time before the jury returned its verdict. We ordered the trial to proceed (Tr. 1673).

At the time of trial we stated that we did not believe that the failure of defense counsel to respond as fully and as promptly to our repeated requests to be furnished the authorities upon which they were relying in regard to their particular legal theories evidenced any effort on the part of defense counsel "to mousetrap the Court" (Tr. 1438). (See, for particular examples of our requests for authorities, Tr. 854, 907, 943, 989, 1152, 1462, 1464, 1845-1846, 2066, 2379, 2625-26, 2954-55, 3083-3089, 3862, 4428-4429 and 5093. See also the pages of the transcript cited in connection with our discussion of our charge to the jury for examples of the separate requests made in that regard).

This is not to say counsel ceased to be vigorous in their representation of their respective clients, or that they gave the slightest evidence of being intimidated by the "great

authority" of a federal judge (Cf. defendants' oral argument on page 17 of the March 14, 1964 transcript). Nor is it to say that this lawsuit was completely free of all heat and friction (on one occasion we spoke quite plainly to counsel for both sides (Tr. 1963-1964)). Nor is it to suggest that there were not some further occasions when four counsel, two from each side, were on their feet at the same time (Tr. 6385-6386).

But it is to say that one does not get a fair picture of how the trial of this case was conducted by viewing isolated and piecemeal occurrences as a general pattern that established the overall atmosphere of the trial. For example, we do not believe that Mr. Jinkinson's declared willingness to risk jail (Tr. 3142); or Mr. McLaren's not unheated suggestion to Mr. Jinkinson of "Don't talk to me like that" (Tr. 5984); or Mr. Jinkinson's suggestion that "the record should show there is no necessity of your [Mr. Purcell's] snarling at me . . . as you frequently do in this lawsuit" (Tr. 5306) were anything other than exceptional instances of counsel's expressions of tension and that such examples in no way reflect a fair picture of how counsel consistently treated each other or the Court.

We, of course, reached points in this case where further discussion among counsel, in our judgment, was producing "more heat between counsel than light to the Court" (Tr. 5988), but the rule in the trial of this case was that even when counsel sometimes commenced a conference in chambers with the Court in something other than the best of spirits (see page 3227 of the transcript for an example), they were consistently willing to try again and again to agree upon procedures that would simplify the trial of the case (see pages 3240-3246 of the transcript for the actual accomplishments of the conference that commenced under somewhat cloudy skies on page 3227 of the transcript).

We recognize that counsel for the defense had and have a job to perform. In a sense, a general post-trial charge

that the defendants were substantially prejudiced and deprived of a fair trial by the comments and rulings of the trial court, by alleged restrictions placed upon defendants' cross-examination and their presentation of evidence, and by the trial court's alleged adverse attitude toward the defendants, defendants' evidence and defendants' counsel, about all of which defense counsel, with one exception (the Theno incident), remained silent throughout the trial, could be said to be an attack upon the judicial integrity of the Court itself. We do not so view it.

Every justice or judge of the United States, before entering upon the performance of the duties of his office, swears or affirms that he "will administer justice without respect to persons, and do equal justice to the poor and to the rich, and that [he] will faithfully and impartially discharge and perform all the duties incumbent upon [him] according to the best of [his] abilities and understanding, agreeably to the Constitution and laws of the United States" (28 U.S.C.A., § 453).

Strictly speaking, we think it is technically correct to suggest that there is no occasion for us to state of record that we did not intentionally violate that ancient oath. We are not charged with any intentional wrong-doing. But defendants' blanket post-trial attack is so blurred and generalized that we feel that the record should reflect that we believe that we complied fully, in letter and in spirit, with the obligation that we undertook when we became a judge of this Court.

Under our system of administration of justice, it is my duty to rule definitely on all allegations contained in any motion for new trial. Accordingly, on the basis of the record and our personal observation of the trial, we find and determine that the defendants were not substantially prejudiced, nor were they deprived of a fair trial by reason of any comment or ruling made by us during the trial; we further find and determine that no unreasonable or pre-

judicial restrictions were placed on defendants' cross-examination or on their presentation of evidence on their behalf; and we further find and determine that the transcript of the proceedings in this case demonstrates that our attitude during the trial toward the defendant, defendants' evidence and defendants' counsel was one consistent with the obligations imposed by our oath of office.

We further state that we have restudied the entire transcript as a whole and that we have particularly studied the portions of the transcript that immediately preceded and followed the isolated portions quoted in defendants' brief. Such study and reconsideration and our recollection of the trial itself convinces us that it can not fairly be said that defendants' arguments in regard to our alleged demonstrated prejudicial attitude are in any degree tenable. We so find and determine.

We finally state and determine that we have not deemed it necessary to discuss any of the alleged instances of demonstrated prejudice other than the Theno incident for the reason that no trial relief was either requested or denied at the time of trial in connection with any of those matters. We think it obvious that individual discussion of such alleged instances would be fruitless because defendants have seemingly held in reserve other instances to which they may desire to direct the attention of the appellate courts (see page 201 of defendant National's new trial motion where it is stated that the alleged instances presented for our consideration, even after trial, are only illustrative and not all-inclusive).

For the reasons stated, defendants' pending motions should be and are hereby denied.

IT IS SO ORDERED.

JOHN W. OLIVER
District Judge

Kansas City, Missouri
May 28, 1964

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NATIONAL DAIRY PRODUCTS CORPORATION,
Defendant.
No. 20542

JUDGMENT

On this 22nd day of June, 1964, came the attorney for the government and the defendant, National Dairy Products Corporation, appeared by counsel.

It is adjudged that the defendant has been convicted upon its plea of not guilty, by a verdict of guilty, by a jury, on August 16, 1963, of the following offenses:

> Conspiring in restraint of trade to fix the in-store prices of milk and to eliminate competition in the sale of milk, as charged in Counts 1, 3, 5, 7 and 9, in violation of Section 1, Title 15, United States Code; and,
>
> Conspiring in restraint of trade to eliminate price competition in the sale of milk, as charged in Counts 11 and 12, in violation of Section 1, Title 15, United States Code; and
>
> Selling milk at unreasonably low prices for the purpose of destroying competition, as charged in Counts 2, 4, 6, 8, 10 and 13, in violation of Section 13(a), Title 15, United States Code;

and the Court, having asked the defendant whether it has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant, National Dairy Products Corporation, is assessed a fine of Fifty Thousand Dollars ($50,000.00) on each of Counts 1, 3, 5, 7, 9, 11 and 12; and, a fine of Five Thousand Dollars ($5,000.00) on each of Counts 2, 4, 6, 8, 10 and 13; for a total fine in the sum of Three Hundred Eighty Thousand Dollars ($380,000.00).

It is further ordered that a stay of execution be granted on the judgment imposed herein, in the event an appeal is taken, until after the final determination of this cause on appeal.

IT IS SO ORDERED.

/s/ JOHN W. OLIVER
District Judge

Dated: June 22nd, 1964

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1962

UNITED STATES *v.* NATIONAL DAIRY PRODUCTS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 18. Argued March 21, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 5, 1962.—Decided February 18, 1963.
(372 U. S. 29)

MR. JUSTICE CLARK delivered the opinion of the Court.

This case involves the question whether § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, making it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," is unconstitutionally vague and indefinite as applied to sales made *below cost* with such purpose. National Dairy and Raymond J. Wise, a vice-president and director, upon being charged, *inter alia*, with violating § 3 by making sales below

cost for the purpose of destroying competition, moved for dismissal of the Robinson-Patman Act counts of the indictment on the ground that the statute is unconstitutionally vague and indefinite. The District Court granted the motion and ordered dismissal. On direct appeal under the Criminal Appeals Act, 18 U.S.C. § 3731, we noted probable jurisdiction, 368 U.S. 808, because of the importance of the issue in the administration of the Robinson-Patman Act. We have concluded that the order of dismissal was error and therefore remand the case for trial.

I.

National Dairy is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States. Through its processing plant in Kansas City, Missouri, National Dairy has for the past several years been in competition with national concerns and various local dairies in the Greater Kansas City area and the surrounding areas of Kansas and Missouri. In the Greater Kansas City market National Dairy distributes its products directly, but cities and towns in the surrounding Kansas and Missouri areas outside this market are served by independent distributors who purchase milk from National Dairy and resell on their own account.

The indictment charged violations of both the Sherman Act, 15 U.S.C. § 1, and the Robinson-Patman Act in Kansas City and in six local markets in the adjacent area.[1] The

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1. Seven counts of the 15-count indictment charged violations of § 3 of the Robinson-Patman Act. The Sherman Act and Robinson-Patman Act counts relate to the same course of conduct.

One Robinson-Patman count, number 13, charges Raymond J. Wise, a vice-president and director of National, with authorizing National's pricing practice and ordering its effectuation in the Kansas City market. *United States* v. *Wise*, 370 U. S. 405 (1962), involves two Sherman Act counts of the indictment which named Wise as a defendant.

Robinson-Patman counts charged National Dairy and Wise with selling milk in those markets "at unreasonably low prices for the purpose of destroying competition." Further specifying the acts complained of, the indictment charged National Dairy with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it . . . by intentionally selling milk [directly or to a distributor] at prices below National's cost." In five of the markets National Dairy's pricing practice was alleged to have resulted in "severe financial losses to small dairies," and in two others the effect was claimed to have been to "eliminate competition" and "drive small dairies from" the market.

National Dairy and Wise moved to dismiss all of the Robinson-Patman counts on the grounds that the statutory provision, "unreasonably low prices," is so vague and indefinite as to violate the due process requirement of the Fifth Amendment and on indictment based on this provision is violative of the Sixth Amendment in that it does not adequately apprise them of the charges. The District Court after rendering an oral opinion holding that § 3 of the Robinson-Patman Act is unconstitutionally vague and indefinite, granted the motion and ordered dismissal of the § 3 counts. The case came here on direct appeal from the order of dismissal.

II.

National Dairy and Wise urge that § 3 is to be tested solely "on its face" rather than as applied to the conduct charged in the indictment, *i. e.*, sales below cost for the purpose of destroying competition. The Government, on the other hand, places greater emphasis on the latter, contending that whether or not there is doubt as to the validity of the statute in all of its possible applications, § 3 is plainly constitutional in its application to the conduct alleged in the indictment.

It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.

We do not evaluate § 3 in the abstract.

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. We might add that application of this rule frees the Court not only from unncessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *United States* v. *Raines,* 362 U. S. 17, 22 (1960).

The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E. g., Jordan* v. *De George,* 341 U. S. 223, 231 (1951), and *United States* v. *Petrillo,* 332 U. S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E. g., United States* v. *Rumely,* 345 U. S. 41, 47 (1953); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); see *Screws* v. *United States,* 325 U. S. 91 (1945).

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harriss,* 347 U. S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with

which a defendant is charged. *Robinson* v. *United States*, 324 U. S. 282 (1945). In view of these principles we must conclude that if § 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them.[2] This is not to say that a head-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage. We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with predatory intent was within its prohibition of "unreasonably low prices."

III.

The history of § 3 of the Robinson-Patman Act indicates that selling below cost, unless mitigated by some acceptable business exigency, was intended to be prohibited by the words "unreasonably low prices." That sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act has long been established. See, *e. g.*, *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911). Further, when the Clayton Act was enacted in 1914 to strengthen the Sherman Act, Congress passed § 2 to cover price discrimination by large companies which compete by lowering prices, "oftentimes below the cost of production . . . with the intent to destroy and make unprofitable the business of their competitors." H. R. Rep. No. 627, 63d Cong., 2d Sess. 8. The 1936 enactment of the Robinson-Patman Act was for the purpose of "strengthening the Clayton Act provisions." *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 544 (1960), and the

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2. It should be noted that, in reviewing a case in which a motion to dismiss was granted, we are required to accept well-pleaded allegations of the indictment as the hypothesis for decision. *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 343 (1952).

Act was aimed at a specific weapon of the monopolist—predatory pricing. Moreover, § 3 was described by Representative Utterback, a House manager of the joint conference committee, as attaching "criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." 80 Cong. Rec. 9419.

This Court, in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954), a case based in part on § 3, recognized the applicability of the Robinson-Patman Act to conduct quite similar to that with which National Dairy and Wise are charged here. The Court said, "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through programs in which "profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Id.*, at 120, 119.

In proscribing sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" we believe that Congress condemned sales made below cost for such purpose. And we believe that National Dairy and Wise could reasonably understand from the statutory language that the conduct described in the indictment was proscribed by the Act. They say, however, that this is but the same horse with a different bridle because the phrase "below cost" is itself a vague and indefinite expression in business.

Whether "below cost" refers to "direct" or "fully distributed" cost or some other level of cost computation cannot be decided in the abstract. There is nothing in the record on this point, and it may well be that the issue will be rendered academic by a showing that National Dairy sold below any of these cost levels. Therefore, we do not reach this issue here. As we said in *Automatic Canteen Co.* v. *Federal Trade Comm'n*, 346 U. S. 61, 65 (1953): "Since precision of expression is not an outstanding char-

acteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings."

Finally, we think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws* v. *United States,* 325 U. S. 91 (1945), in which a requirement of intent served to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.,* at 102; see *id.* at 101-107. Proscribed by the statute in *Screws* was the intentional achievement of a result, *i. e.,* the willful deprivation of certain rights. The Act here, however, in prohibiting sales at unreasonably low prices for the purpose of destroying competition, listed as elements of the illegal conduct not only the intent to achieve a *result*—destruction of competition—but also the *act*—selling at unreasonably low prices—done in furtherance of that design or purpose. It seems clear that the necessary specificity of warning is afforded when, as here, separate, though related, statutory elements of prohibited activity come to focus on one course of conduct.

United States v. *Cohen Grocery Co.,* 255 U. S. 81 (1921), on which much reliance is placed, is inapposite here. In *Cohen* the Act proscribed "any unjust or unreasonable rate or charge." The charge in the indictment was in the exact language of the statute, and, in specifying the conduct covered by the charge, the indictment did nothing more than state the price the defendant was alleged to have collected. Hence, the Court held that a "specific or definite" act was neither proscribed by the Act nor alleged in the indictment. *Id.,* at 89. Moreover, the standard held too vague in *Cohen* was without a meaningful referent in business practice or

usage. "[T]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute. . . ." *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 240-241 (1925). In view of the business practices against which § 3 was unmistakably directed and the specificity of the violations charged in the indictment here, both absent in *Cohen*, the proffered analogy to that case must be rejected.

In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940); *NAACP* v. *Button*, 371 U. S. 415. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute "on its face" but also in the light of the conduct to which it is applied. The reliance of National Dairy and Wise on First Amendment cases is therefore misplaced.

IV.

This opinion is not to be construed, however, as holding that every sale below cost constitutes a violation of § 3. Such sales are not condemned when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor. 80 Cong. Rec. 6332, 6334; see *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481 (C. A. 10th Cir. 1957). Sales below cost in these instances would neither be "unreasonably low" nor made with predatory intent. But sales made below cost without legitimate commercial objective and with specific intent to de-

stroy competition would clearly fall within the prohibitions of § 3.

Since the indictment charges the latter conduct and, as noted, *supra*, n. 2, we are bound by the well-pleaded allegations of the indictment, we must conclude that National Dairy and Wise were adequately forewarned of the illegal conduct charged against them and remand the case for trial. Our holding, of course, does not foreclose proof on the merits as to the reasonableness of the alleged pricing conduct or, for that matter, the absence of the predatory intent necessary to conviction.

Reversed and remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG join, dissenting.

The statute here involved makes it a crime to sell "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 15 U. S. C. § 13a. In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), this Court held unconstitutional and void for vagueness a statute which made it a crime "for any person willfully . . . to make any unjust or unreasonable rate or charge" in dealing in or with any necessaries. The rule established by that case has been often followed,[1] is in my judgment sound, and should control this case. Accordingly, I would affirm the District Court's judgment holding the statute invalid. The Court here attempts by interpretation to substitute unambiguous standards for the vague standard of "unreasonably low prices" used by Congress in the statute. It seems to me that if this criminal statute is to be so drastically reconstructed it should be done by Congress, not by us. Moreover, I agree with the Attorney General's National Committee to Study the Antitrust Laws, which concluded:

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1. *E. g., Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); cf. *United States* v. *Cardiff*, 344 U. S. 174 (1952).

"Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law."[2]

STATUTES AND RULES INVOLVED

Set forth below are the texts of the Fifth and Sixth Amendments to the Constitution of the United States; Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1; Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13a; pertinent portions of Sections 2(a) and 2(b) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a) and 13(b); and Rule 6(e) of the Rules of Criminal Procedure for the United States District Courts (18 U.S.C.).

Amendment V to the Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI to the Constitution

"In all criminal prosecutions, the accused shall enjoy the

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2. Atty. Gen. Nat. Comm. Antitrust Rep. 201 (1955) (Recommending repeal of § 3).

right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Sherman Act, as amended

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

Section 3 of the Robinson-Patman Act

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Sections 2(a) and 2(b) of the Clayton Act, as Amended

Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provide in pertinent part as follows:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

Rule 6(e) of the Rules of Criminal Procedure for the United States District Courts

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

GRAND JURY REFRESHMENT PROCEDURE

Set forth below are excerpts from the record showing the manner in which grand jury transcript was utilized by Government counsel in the attempted refreshment of various witnesses, the character of the testimony so elicited, and the motions by the defense to inspect the portions so used, and other portions on the same subject matter, all of which were denied.

Testimony excerpted is from direct examination except as otherwise indicated.

For the convenience of the Court, we have included a Glossary of Names, identifying the witnesses, and other persons whom they mentioned, by job title and employer. We have also described in the margin at certain points the particular issues under the indictment as to which the witnesses were being questioned.

Glossary of Names*

Witnesses	Appendix Pages
John Flanagan Sealtest General Sales Manager	A-158
Vincent Crimmins Fairmont Foods Co., Country Club Dairy former Sales Manager	A-195
Edward Gilmore Hawthorn-Mellody Dairy former Sales Manager	A-202
Arthur Augenstein Borden General Manager	A-214

* Persons identified had offices in Kansas City unless otherwise noted.

Appendix Pages

Frank Gardner — A-247
Assistant to Raymond Wise,
Vice President in charge of
Sealtest Central Division, Chicago

John Baird — A-261
Sealtest Milk Sales Manager

David Stewart — A-266
Sealtest General Manager

Persons Mentioned In Extracted Testimony

William Callender
Foremost Division Manager

Erhard Edquist
Fairmont Foods Co.
Vice President, Omaha

Jack Felts
Borden Sales Manager

J. M. O'Bryan
Foremost General Manager

Jack Pentz
Borden Division Manager
Columbus, Ohio

Carl Peterson (deceased)
Fairmont Foods Co., former
Country Club Dairy General Manager

Raymond Wise
Vice President of Petitioner in
Charge of Sealtest Central
Division, Chicago

Paul Young
Hawthorn-Mellody Dairy,
Chicago, Vice President

Attorneys for the Parties

Messrs. Jinkinson, Hernacki, Eisen, Howard and Mann were attorneys representing the Government. Messrs. Chadwell, McLaren, Lashly and Purcell were attorneys representing defendants.

JOHN FLANAGAN
Sealtest General Sales Manager

(R. 417)

Q. Mr. Flanagan, on or about September 10, 1957, were you present at a meeting held in Chicago, Illinois, in Mr. Wise's office at which were present Mr. Wise, Mr. Gardner, Mr. Stewart, Mr. Pentz and Mr. Augenstein?

A. Yes, sir, I was.

(R. 419-421)

Q. Now, at this time, was anything said about this Hawthorn-Mellody discount offer?*

A. They asked if we were aware that there was an offer to the Milgram Company, and certainly we said we were.

Q. Did Mr. Wise have a copy of this discount offer which you had obtained?

A. I don't know if he had a copy or not, sir, I don't know whether he did or not.

Q. What was said by each of the parties about the offer?

A. Well, Mr. Wise certainly said that we were quite concerned about it, but that was about the sum total of the

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* An alleged objective of the claimed conspiratorial price war charged under Count 11 was to compel Hawthorn-Mellody to withdraw its discount offer to the Milgram chain. Petitioner contended that it initiated a 4¢ per half-gallon price reduction entirely independently, and a Government exhibit, a contemporaneous report by a Sealtest auditor, stated that the reason therefor was "[b]ecause milk in gallon jugs ha[d] been selling at exceptionally low prices" (GX 77). Other evidence showed that gallon jugs had been priced 13¢ below two Sealtest half-gallon cartons in the stores, and 23¢ below home delivery (R. 5182-83, 6124-25).

conversation in regards to our knowing the Hawthorn-Mellody offer.

Q. Was anything further said about the offer or about doing something about that offer?

A. No, sir, there wasn't.

Q. Can you think real hard, Mr. Flanagan, and see if you can remember anything further said about what should be done about this offer?

A. There was nothing said as to what would be done about it. We were vitally concerned about it as well as apparently they were, too. But as to what to do about it, there was nothing said about this at all.

Q. Was Mr. Wise of a view that the prices should drop in the community?

A. No, sir.

Q. Did Mr. Pentz say anything about going to see Mr. Young or Hawthorn-Mellody, either one, to ask them to withdraw the discount?

A. No, sir. This was not said.

Q. I am not limiting myself, you understand, Mr. Flanagan, to that particular language, but did he just in any way express any words which would convey that thought?

A. Well, certainly not to my knowledge, anything that I heard, was there any inference or reference made to what you stated.

Q. Do you recall, Mr. Flanagan, Mr. Pentz asking Mr. Wise if he would go with him to see Mr. Young to get him to withdraw the discount?

A. Mr. Pentz asked Mr. Wise to accompany him to lunch with Mr. Paul Young.

Q. And did he state what the purpose would be in asking him to come along with them?

A. No, sir, he did not.

Q. Didn't he say that he would ask them to withdraw the offer?

A. No, sir, he did not.

(THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN COURT CHAMBERS, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

(R. 422)

MR. JINKINSON: We are now in the position where we are going to have to use the Grand Jury transcript to refresh this witness' memory, and having in mind what the Court said this morning about the matter, why, this may be an appropriate time for the jury to be dismissed—I mean recess for the day and we could take the matter up with Your Honor in Chambers to straighten out, as you said this morning you were going to do.

THE COURT: It is twenty-five after four now. I think we ought to get in thoroughly to the question of utilization of the Grand Jury transcript for the purposes of refreshing recollection or impeachment and lay out the ground rules. I think it would probably be best to go back in Chambers and discuss that.

MR. JINKINSON: Would the Court want us to go a step further and ask him if he testified before the Grand Jury and lay the proper foundation?

THE COURT: I think we ought to cover that back in the whole business, the whole ball of wax.

MR. CHADWELL: We may be able to straighten this out.

(R. 425-430)

THE COURT: Let me make this statement, at 4:25, the first occasion to get into the question of the manner in which a particular witness's recollection might be refreshed by use of testimony given before the grand jury arose.

The Court at that time excused the jury until 10:00 o'clock in the morning in order that the procedure that will be now established in connection with the witness

Flanagan may be generally applied where similar situations arise through the trial.

Immediately before we went on the record, Mr. Chadwell indicated that he had a practical suggestion as to how this problem may be solved and I will now ask you, if you will, to make the suggestion.

MR. CHADWELL: Thank you, Your Honor. Well, as Your Honor knows, this gets into quite a complicated problem. I may say I have got quite a memorandum here on it. * * * I would say as a compromise proposal on this thing, realizing all the pros and cons, if Mr. Jinkinson would be willing to show to the Court, not one excerpt from the record that he chooses to pick out where something was testified to on this subject, if it was, but all excerpts in the record of this witness, on this subject.

I don't mean to burden the Court by reading the entire testimony, all of them, in which this subject is discussed, and then give me an opportunity to see those, after the Court has read them, if the Court feels they are material to this question, let me see them, or Mr. Purcell, Mr. Lashly, and then let's see if we can work out a plan of procedure on the thing to show the witness.

Certainly if the witness has said something that should be used to refresh his recollection, and I am sure he would be the first to want to have it, but the problem that I always have in this thing is, the Government decides what they are going to show him to refresh his recollection and I have never—I am never sure whether they are showing him one statement that may be qualified, modified or changed later on or not, and I think they have it within their power to represent to the Court that this is everything the witness said on the subject whether it appears in one place or fifteen places in the testimony.

Now, I think that counsel for the defendants should be permitted to see that. Now, I think that the problem

frequently arises, counsel for the defendants will say, well, the Government has picked out a question and answer or, whatever they have picked out, and hear the witness testify for two days, and we think we ought to see the whole testimony, because there may be qualifications or statements, and I could be willing to accept Mr. Jinkinson's representation to the Court to save the Court the burden of going through the whole thing that this is all the man said on the subject, and let's start from there, and I would think the Court ought to see it before I do, and then I think that what the witness says should be shown to counsel for the defendant, and maybe we can get an agreement on what the procedure should be.

THE COURT: Mr. Jinkinson, what is your view?

MR. JINKINSON: Well, Your Honor, this question of the use of grand jury transcripts and refreshment of a witness's memory is so well established, it is so universal in its application that I don't see how anybody could at this late date have any doubt as to, (A), the Government's right to use it in the manner in which we propose to use it, and, (B), that under no circumstances in criminal antitrust cases has a Court ever permitted counsel for the defendants to see the grand jury transcript. It is not a question of using it for impeachment purposes, we do not propose to do that.

There is a fine line of demarcation of what is on paper and what is the recollection of a witness's memory. Of course, we are all interested in seeing that the witness's memory is refreshed. No one else's memory needs to be refreshed, not Mr. Chadwell's or mine or anyone else's, the only one we want is the witness to see if this assists him in refreshing his memory.

We are not going to show it to the witness. We are going to read to the witness, after laying a proper foundation, "Have you appeared before the grand jury and testi-

fied, was this question asked and this answer given," or the Court may read to the witness that portion of the grand jury transcript after he inspects it, which will assist the witness or which the Court thinks will assist the witness in refreshing his recollection.

Now, those are the only two cases which I can find in the law books in which anybody can use the grand jury transcript for the purpose of refreshing a witness, it only permits Government counsel or the Court to read those portions of the grand jury transcript of the witness and ask him a single question.

"Now, having heard that question read and the answer you gave the grand jury, does this refresh your memory?" If he says it doesn't, that is the end. If he says it does, all right, let him testify.

Of course, this is after the Court has examined it in camera. Although in the Socony Vacuum case, I don't think it got so firmly established—I think they used it over ninety times in refreshing the memory of the witness. And, of course, all these cases are identical in that the witness always appears to be—always generally is somebody connected with the conspiracy; industry witness, in other words. This is the problem you have in these things.

I think this is a classic example of it, the grand jury in 1958, even at the time some of this was going on, witnesses were appearing before the grand jury making much more complete answers than they are making now.

Now, we get to trial six or seven years later, we ask the witness a question, like Flanagan—of course, we had no opportunity to interview him before he went on the stand, we asked him—I have asked Mr. Hernacki, I asked him if he asked him. He said he did.

MR. CHADWELL: You didn't tell me, incidentally, you were going to ask him, I might mention that, and I told Mr.—Mr. Purcell and I told the witness that if they

are approached by the Government counsel, they are to say to Government counsel they are to see me or Mr. Purcell.

(R. 432-438)

THE COURT: * * * Now, let me state what I think the state of the law is. First, there is no question but that testimony given before a grand jury may be used to refresh the recollection of a particular witness.

Second, that the rationale of these cases do not specifically define what constitutes "refreshment of recollection" but that the clear gloss of the cases indicates from the Supreme Court of the United States on down that if a particular witness did give definitive testimony before a grand jury that the law, either by defining what it is doing as refreshing of recollection is going to make certain that this witness's attention is called to the fact that at a time when events were much fresher in his mind, he had a much better recollection, as is evidenced from the transcript of his testimony before the grand jury, and that call it what you may, it is permissible to permit examination by reading relevant questions and answers to that particular witness.

In the next instance, and a question of the factors controlling the discretion vested in the trial court relates itself to whether the procedure followed permits an abuse of this by permitting the Government counsel to use portions of the transcript which may or may not be calculated reasonably to refresh the witness's recollection.

As I read the cases, protective devices have been erected to prevent that from happening, even inadvertently, and most of these devices relate to an examination by the Court in camera of the questions and answers that the Government would like to utilize in the refreshment process.

I think the cases are quite clear that except for the type of discovery that is currently being engaged in the electrical cases, the general sanctity of secrecy relating to the

grand jury has reasonably well established the practice that the trial court even in some instances conducts the examination itself.

It is my personal view that two steps protectively should be taken before any attempt is made to utilize the grand jury minutes, the first step being that counsel for the Government exercise the utmost discretion in being completely fair with the witness in the choice of the questions to be asked.

Now, I mean by that if it is obvious to counsel, as it would be in my judgment obvious to experienced counsel in this case, that an inadvertent expression setting a particular date was made that within a matter of two or three questions clarified itself that I would view it eminently unfair to attempt to hold this witness to that particular date if it is obvious that he acknowledged that he made an error and corrected that date and put in another year or another month or something of the sort.

This is apparent in reviewing any testimony as to where an honest mistake is made, and that the real testimony must be developed by reading on the four corners of the witness's testimony.

In the next instance and as a protective step, I think it incumbent upon the Government after its selection of critical questions and critical answers, to make its trial inquiry in substantially the same language as the question was asked the witness before the grand jury, either a direct quote or a substantially fair paraphrase of the question asked.

Now, I am quite confident that counsel cannot, by the very nature of things, anticipate all possible lapses of memory, but I do think counsel can anticipate those lapses of memory which they feel are necessary to be inquired about of a particular witness, so that counsel in connection with the examination of a particular witness whom it an-

ticipates might develop a frailty of memory, if I may put it that way, should mark, in accordance with Mr. Chadwell's suggestion, all testimony before the grand jury relating to the subject matter on which counsel wish to refresh the witness's recollection.

Consistent with as early a declaration as Sir Francis Bacon, I think courts should permit counsel to try their cases rather than intervene.

My preference on this subject would be to permit examination by the Government after I have been handed a marked portion of the transcript and may review and determine whether in my judgment the questions that you would intend to read, and the answers you would intend to read would reasonably have the effect of refreshing the particular witness's memory.

If I determine they would not, I will not permit you to read those questions. If I determine that it will, I would prefer that you read it not in an accusatory manner but to actually try the theory, "Do you recollect that this question was asked you, and do you recollect that this answer was given," and that histrionics shall be omitted.

MR. JINKINSON: I agree a hundred per cent.

THE COURT: And the theory of this is that it would be helpful in recollection, and we presume that because of the lapse of time this would be a method of actually having the witness testify to the truth as he knew it then.

Now, one other observation that I would make, and that is if counsel inadvertently became enthusiastic about the manner and the tone in which they would utilize this testimony, which I do not anticipate, but which sometimes happens in some cases that are tried in my court, and if, to use the language of the Ozark Southern Division, counsel begins to "wool the witness around," I am going to step in and conduct the examination myself.

I think that was what happened actually either in Socony

Vacuum or Cox in some ninety separate instances. I hope this is not necessary.

That is my general view and I am not at all sure that under the Supreme Court cases that to handle it differently and to permit examination by defense counsel might not actually be error.

I know of no instance in which in the cases where there in effect has been a checking on the trial court's judgment as to whether it was proper or whether it wasn't proper.

MR. CHADWELL: I think the trial court has almost unlimited discretion in this field, under Rule 60. I really think that.

THE COURT: Do you know of any cases, Mr. Chadwell, in which the method you suggested has actually been utilized?

MR. CHADWELL: No, I made the suggestion, Your Honor—

THE COURT: Well, I have seen the suggestion made before, and I think the real reason why it has not been adopted is the almost inevitable probability that collateral issues as to whether particular questions do or do not refresh would be injected into it and you emphasize far beyond the importance of the subject by having the collateral debates between counsel and the Court.

It has been my observation in the utilization of anything on refreshment of recollection where a witness has made a prior statement that one of two things happen, either the witness readily affirms that he did recall that question, he did recall that answer, and adopts it; either that or you have a witness that doesn't agree to anything.

(R. 441-442)

MR. JINKINSON: If this is all right with the Court, we make this suggestion, that we mark in red that portion of the grand jury transcript that we would like to read to the witness to refresh his memory. In black, all—that would be the additional testimony. They have two marks, black and red. Red means to refresh his recollection. Black means this is additional testimony on the same subject.

THE COURT: Yes, I would also like to make this suggestion and I think it would flow much easier, that you pay particular attention to framing your question in substantially the same sense, if not in the same language.

(R. 447)

MR. CHADWELL: Your Honor, I move for the privilege of examining the portions of the transcript which Mr. Jinkinson has marked and submitted to Your Honor.

THE COURT: The Court is going to deny that at this time, Mr. Chadwell.

(R. 448)

MR. CHADWELL: I just want to point out to Your Honor that, of course, I do not know what the transcript reveals, and if I did know, I think, would make it easier for me to handle any questions that might be asked or handle any cross-examination on this point. I do not know whether that will be necessary or not, of course, at this time.

THE COURT: I understand your dilemma perfectly, but I think we maintain an even keel by experimenting with the present procedure at this time, and I assure counsel on both sides that I will follow on the testimony very carefully.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(R. 452-456)

Q. Mr. Flanagan, I am going to read—strike that—did you testify before the Federal Grand Jury here in Kansas City on or about October 21st, 1958?

A. Yes, sir, I did.

• • •

Q. I am going to read to you some questions and answers and I will ask you to listen to them carefully and then I will ask you some questions about it, sir.

• • •

Q. "QUESTION: When did that take place?" This is now in reference to the September, 1957, meeting in Chicago in Mr. Wise's office which you were discussing at the end of your testimony, sir.

• • •

"ANSWER: That took place in Mr. Wise's office in Chicago."

"QUESTION: About what time, when?"

"ANSWER: Early fall of"—

MR. CHADWELL: Will you go a little slower? I don't have the privilege of a copy of this.

"ANSWER: Early fall of 1957."

• • •

Q. "ANSWER: And in that meeting, Mr. Stewart asked if I would accompany him to Chicago for a meeting with Mr. Wise and Mr. Gardner and when I arrived there, Mr. Pentz of Borden's and Art Augenstein of Borden's were there in the office, and I don't remember the specific conversation as to who said what, the general conversation, but Mr. Pentz had asked Mr. Wise to accompany him, and see Paul Young of Hawthorn-Mellody Company to ask him to withdraw the 13 per cent offer to Milgram's, and Mr. Wise was very emphatic in saying he certainly would not, and it disturbed him very much that Pentz would even ask him to do that, and that was about the essence of that meet-

ing. It wasn't a very long meeting and it broke up. This was prior to our meeting the competitive situation with the Milgram's Company so that would be in line with your thinking a while ago that no doubt the Borden Company had to meet the situation the same as we would have to meet it."

Were you asked those questions at that time and did you give those answers, sir?

A. Yes, apparently this is what I said. This is what you read from my testimony.

Q. Does that refresh your recollection in any respect as to what Mr. Pentz said to Mr. Wise on that occasion?

A. Well, the question I have in my mind—I am not certain I recall Mr. Pentz' making a direct reason why they were having lunch, I don't know that this was the statement that was made at all. I don't recall this.

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THE COURT: Had you completed your answer?

THE WITNESS: Only that I do want to be certain that I am not just real sure that I heard Mr. Pentz say. I think possibly that I have—since we were all so conscious of this very drastic offer by the Hawthorn Company to the Milgram Company, a customer of ours that represented some 40 per cent of our wholesale business. I think I was so conscious of it that I may have assumed that this is what he had in mind, so that is the best way I could state it and the most factual way I could state it.

THE COURT: Let me ask you whether your prior testimony to the effect that Mr. Pentz had asked Mr. Wise to accompany him and see Paul Young of the Hawthorn-Mellody Company to ask him to withdraw the 13 per cent offer to Milgram's presently recalls to your mind what happened at this meeting and whether you can presently testify that Mr. Pentz did so ask Mr. Wise to call upon Mr. Young to withdraw the 13 per cent offer?

THE WITNESS: Well, sir, I just couldn't be positive that I can recall even hearing Mr. Pentz say his reason for

going. I do recall him asking Mr. Wise to accompany him, I do recall Mr. Wise saying emphatically no, that he didn't want to do a thing of this kind, didn't want to have lunch with him, and that is the best of my recollection.

THE COURT: Do you recall the substance of what you now recall revolved around the 13 per cent offer to Milgram, that that was the subject of the conversation?

THE WITNESS: Well, sir, there was an offer made. It was around that subject and that is why I was so conscious of it, I am sure, and the whole flavor of the whole meeting was the very consciousness of this very serious matter, so I very possibly could have assumed this rather than actually hearing it, for I don't recall of actually hearing the statement made for any particular reason other than to have lunch.

THE COURT: Very well, you may proceed, counsel.

(R. 463-464)

Q. May I ask you this: At this meeting, now, in '57, again, is it not a fact, Mr. Flanagan, that at that meeting, Mr. Wise thought the best way to meet these problems which he discussed and you have related, was to lower prices and Mr. Pentz of Borden said, "I will try to get Mr. Young to withdraw it," that was his solution, isn't that the case?

A. No, sir, that is not the case, Mr. Hernacki, that is not the case.

Q. Did Mr. Pentz tell Mr. Wise he would relate to him whatever happened with Mr. Young?

A. No, sir, he did not have any reference to it other than asking Mr. Wise to have lunch with he and the Hawthorn-Mellody people. That is the best of my recollection. There was nothing talked about this subject you are referring to.

(R. 469-470)

Q. Let me move to a meeting—I am sorry, let me move

to approximately June 13th, 1958, Mr. Flanagan. Do you recall a meeting held about that time?*

A. I am not real certain of specific dates, Mr. Hernacki. If you could recall a little more or give me a little more information—

Q. All right. Do you recall a meeting at which were present in the President Hotel in Mr. Wise's suite there, Mr. Pentz, Mr. Edquist, Mr. Augenstein, Mr. Callender, Mr. Wise, Mr. Gardner, Mr. Stewart and yourself?

A. Yes, sir, I do recall the meeting.

(R. 473-477)

THE COURT [sic]: Mr. Flanagan, what, if anything, was said about raising prices?

THE WITNESS: Nothing about raising prices.

Q. Well, will you try to think about it to see if anybody

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* The questioning related to an alleged two-step plan to first lower, then raise prices in Kansas City in the period June-October 1958, which was charged to constitute a conspiracy in violation of the Sherman Act under Count 12, and to involve sales at unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act. Petitioner contended, and there was substantial evidence showing, that, owing to very low gallon jug prices, various areas in the Kansas City market in the spring of 1958 had low milk prices ("spot prices") generally, with the result that Sealtest retailer customers in different neighborhoods were paying widely varying prices, and home delivery business was rapidly disappearing; that when competing dairy companies (alleged co-conspirators) indicated they wanted to raise list prices, Sealtest executives declined to participate, revealing however that they were considering alternative courses—either introducing a new discount schedule at the current 33¢ list price, hoping thereby to eliminate price discrimination among Sealtest customers—or else recognizing the *de facto* average price of 27¢ by lowering list prices to that level (neither of which steps by Sealtest would have required acquiescence by or cooperation from competitors) (R. 834-40, 961-64, 6207-13, 6467-78); and that when Fairmont-Country Club Dairy thereafter lowered its price to 27¢, this was its independent decision, compelled by low store prices which were destroying Fairmont's home delivery business, and not done by reason of any conspiracy (R. 310-13, 720-22, 1658-60, 1722-25).

at that meeting said anything to the effect that they thought prices should go up or should be raised or the market should go up, anything to convey the idea that the prices should go up?

A. I don't recall any conversation of that kind, no, sir.

Q. Do you recall Mr. Pentz saying anything to the effect that prices should go up?

A. No, sir, I don't.

Q. Or Mr. Edquist subsequently after he said that, Mr. Edquist agreeing with him?

A. No, sir, I don't recall this.

Q. Did Mr. Wise say anything about he didn't think it should go up?

A. No, sir, I don't recall any conversation in regard to price of milk.

Q. Did Mr. Wise indicate in any language, any way the thought I am about to express, namely, that he didn't think the market was right or ready or ripe for an increase?

A. I don't recall this at all, no, sir.

Q. Did he say that to raise prices at that time would be the wrong thing to do?

A. No, sir, there was no reference to any—

MR. HERNACKI: Your Honor, may we approach the Bench?

THE COURT: You need not. I have followed this. You may refresh your witness' recollection.

Q. Mr. Flanagan, I am going to read to you again the testimony you gave in 1958 before the Federal Grand Jury in October of that year. I will ask you to listen to the questions and answers and again I will ask you something about it:

"QUESTION: You said something was said about raising the prices on the market. Who brought that question up?"

"ANSWER: Mr. Pentz brought it up, and Mr. Edquist brought it up."

"QUESTION: What did Mr. Pentz say about raising prices on the market?"

"ANSWER: Mr. Pentz was very anxious to raise the price of milk."

"QUESTION: And after he voiced that to you, what did Mr. Wise have to say about that?"

"ANSWER: Well, Mr. Edquist chimed in before that and said that certainly he thought that was the thing that should happen and Mr. Wise said, 'With the condition of the market today, I don't think it is right. Our company doesn't feel it is the time to raise it. We certainly are most anxious to get our house in order and to get things on a proper business basis, which it is not today, and to raise the price of milk certainly would be a wrong thing to do.'" Were you asked those questions and did you give those answers at that time, sir?

A. If you are reading from my grand jury wordage, apparently I did say this.

Q. Does that in this respect refresh your memory as to what was said on the subject of prices at this meeting?

A. Well, it is as new to me right now since you are reading it--I am not able to recall any more.

THE COURT: When you say, Mr. Flanagan, you are not able to recall any more, does this refresh your recollection that Mr. Pentz did bring this up and that Mr. Edquist brought it up and there was some discussion of this and Mr. Wise had indicated that he did not think now was the time to do it?

THE WITNESS: I don't recall it.

THE COURT: And this testimony does not refresh your recollection at all?

THE WITNESS: No, sir, it doesn't. I don't recall it being discussed.

(R. 494-495)

Q. Did Mr. Wise at the meeting in June, 1958, at the President Hotel, which we have been discussing, say that he

thought that spot pricing should be removed?

A. I don't recall any specifics in regard to conditions of the market other than saying that they were simply deplorable and that the gallon jug thing, quite badly. Now, this is my main recollection of the meeting and the topic of conversation.

Q. Did he say that he thought the two-for-ones were wrong?

A. I don't recall him saying it. I know he felt that they were wrong, I know we felt—

Q. Again, Mr. Flanagan, we are only interested now in what he said at the meeting as best you recollect.

A. I don't recall him saying this.

Q. Did he discuss the 13 per cent discount or the long discount to Milgram?

A. I don't recall whether he discussed percentages or whether the subject was talked about or not. I am not able to recall.

Q. Was anything said about the discount being granted to Milgram?

A. Oh, there was some reference to the pricing of milk out-of-store by Mr. Edquist, if I recall properly, and he was concerned about what this product could cost the dealers so they could use it for a cost leader out-of-store market prices.

Q. Is this in relationship to particular account?

A. They had—in relation to the Fleming Company and the Milgram Company, if I am not mistaken.

Q. And again what did he say about that?

A. Wondering if there was a discount that would allow a different price. I don't recall the specifics of it now.

(R. 497-507)

Q. Didn't Mr. Pentz say at this meeting that because Sealtest and Borden's, and again in any language, because Sealtest and Borden both were selling Milgram's, that they could get that price up if they desired?

A. I don't recall that being said that way.

Q. In other words, they could eliminate discounts between them?

A. I don't recall that, I sure don't.

Q. Isn't that when Mr. Edquist made the remark that he thought that should be done so that there should not be any accounts having a special price other than the published schedule?

A. I don't recall this specifically.

Q. Well, now, we have talked about it. What is your best recollection now?

A. Well, as I say, with the—in their case, TV Fleming oftentimes being sold out-of-store less than prevailing market prices, he was concerned, Mr. Edquist, if I recall, as to what was the discount schedule with them so they could do these things. Of course, there was nothing with them, and this is the thing that was misunderstood so many times, that Fleming paid the same price for TV milk as they did Sealtest which was our going schedule.

Q. Isn't it possible that you weren't going to tell Mr. Edquist for certain whether or not Fleming was getting a special discount?

A. Restate that, sir.

Q. I am suggesting that you would not want Mr. Edquist to know definitely the basis on which you were selling Fleming TV milk?

A. Well, it would be no one's business but ourselves, how we conducted ourselves.

Q. So at that meeting, would it not be the case that Mr. Wise would not tell the other that Fleming TV was not getting any better discount than anybody else?

A. I don't know whether—I didn't hear it so I don't know.

Q. Didn't Mr. Wise say that the off-program pricing, or the long discount or the Milgram discount, whatever you wish to call it, should be eliminated from the market "so

we would be able to say we have a sound market on a good sound basis?"

A. I don't recall this, sir, the particular wordage of this kind, I don't recall.

Q. Now, in any other language, did he convey that thought?

A. I don't recall it, I certainly don't.

MR. HERNACKI: Your Honor, at this time—

THE COURT: Do you have in mind—

MR. HERNACKI: I have in mind—

THE COURT: What page?

MR. HERNACKI: 1643 and 1644.

THE COURT: You may proceed.

Q. At this time, Mr. Flanagan, I would like to again read from the October, [1958] grand jury transcript,—

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"QUESTION: Did Mr. Wise say he thought the spot pricing should be removed?

"ANSWER: He thought that spot pricing was wrong, yes."

"QUESTION: He thought it should be removed before you raised your prices?

"ANSWER: He thought the subsidy to grocers should be discontinued. He thought that the two-for-ones were wrong. He thought the competitive situation we found ourselves in, with the Milgram Company served by the Borden Company, as well as our own, on a 13 per cent discount should not be handled on the basis it was handled, it should be a published discount—

"QUESTION: (Interrupting.) Do you mean one special account, Milgram's, had been given this large 13 per cent discount?

"ANSWER: Yes, sir.

"QUESTION: And you say—don't they use the term "long discount," you say that should be eliminated in this market? Is that the term used to describe a 13 per cent or large discount like that?

"ANSWER: I haven't heard that. It's just an off-program pricing. I'll put it that way.

"QUESTION: Do you feel that was discrimination, that large discount to that one account?

"ANSWER: Well, it was a competitive move on our part.

"QUESTION: To meet it?

"ANSWER: To have to meet the situation. We were—

"QUESTION: (Interrupting.) Did he say that was one of the things that would have to be eliminated before he felt he could raise his prices in this market?

"ANSWER: He felt that certainly should be eliminated from the market so we would be able to say we have a sound market on a good sound basis.

"QUESTION: So he outlined about three or four things he thought should be accomplished on this market before there was any price raise?

"ANSWER: He outlined the things as a desire of our company to put into practice before we would be interested in raising the price of milk."

Now, were you asked those questions, Mr. Flanagan, and did you give those answers at that time?

A. That is apparently what you have read here, as being part of my grand jury conversation, apparently that is the way it was said.

THE COURT: Just a moment. Did you have something else?

THE WITNESS: Yes, I am saying Mr. Wise, in here as you read, that Mr. Wise always has expressed himself, has always, that any customer treated differently than another on a fair and equitable basis was wrong. This has been his philosophy I have heard for many years, and he felt that spot pricing, he felt that discounts to someone other than another account of like size or stores of similar size was as wrong as it could be, and he did not like it, and I don't recall him discussing this in this meeting but if he did, I am not surprised.

Q. Well, what does this material refresh you on now that you have heard us go through it? What does it remind you, what does it ring a bell, however dim in your mind?

A. Other than just what I have refreshed myself, this is what I recall.

Q. You have told us what the philosophy of Mr. Wise was. Did he discuss this philosophy at the meeting?

A. That is what I say I don't recall. Having known Mr. Wise as long as I have and knowing how he operates, how he works, how he feels, this is Mr. Stewart's feeling too, as well as my own, that I don't recall him expressing this, during this meeting that you are speaking of, but—

THE COURT: Mr. Flanagan, let me explain the purpose of why counsel read you these questions and answers. The purpose of that is to see whether or not, in hearing what you had testified to in 1958, aids you at the present time in recalling what was said at these meetings.

THE WITNESS: Yes, sir, I understand that.

THE COURT: Now, do the questions and answers that counsel has read to you help you refresh your recollection as to what was really said there? That is what we are trying to get at.

THE WITNESS: I appreciate it, sir, and I am trying to recall. I don't remember these being about in the presence of competition. I don't recall this.

As I say, it wouldn't be any trouble for me at all to recall what his philosophy of operating a business, but whether or not he discussed this, I am not certain, and this is the part that I certainly want to make myself clear on. I understand the purpose but I am not able to say.

THE COURT: I wanted to be sure you did understand the purpose.

THE WITNESS: Yes, sir.

THE COURT: And to listen to your prior testimony in order that you can take that into consideration as you presently search your recollection here today.

THE WITNESS: Yes, sir. As I say, it has been—1958, this is four years and we have had very chaotic market since all this time, and to remember specifics is just really beyond my capability.

THE COURT: I understand.

THE WITNESS: But I will do my very best, sir.

Q. At the time you testified, Mr. Flanagan, as you now sit there, do you recall that that testimony you gave was your very best recollection?

A. Yes, on the spur of the moment, without having a lot of time to consider or think about it, as I recall, I was asked questions before a group of people who were the jury, and I think some two or three attorneys, Mr. Mann, Mr. Eisen posed these questions, and I gave answers the best I knew how at that time.

Q. Now, is there anything in which I have just completed reading which you now believe was wrong or different or in any way a change from what I have read, in other words, you now remember something that was different from what I have just read to you?

A. No, I am not able to connect the two together. My memory just doesn't serve me this well. I am sorry.

Q. Does this refresh you in any respect, that not only was Mr. Wise opposed to the giving of that discount which was being given to Milgram, but Mr. Pentz made what you might say an offer that "we can both eliminate it because it is only business between us," and Mr. Edquist said "that is, in effect, a good idea to do that. It should be done?"

A. I don't recall this, that there was anything of this kind. I know that Mr. Edquist was quite concerned as to how these stores could be pricing differently. He certainly, himself, felt that if there was anything different than a standard published program that was contributing to chaotic conditions of the market, that they were not correct or not right. Knowing as—I am repeating myself—but knowing Mr. Wise's philosophy of market management, that if this be the case that he certainly would agree.

Now, whether he agreed with these folks present or whether I am recalling just the philosophy that I have grown up and learned and have known in this business for a number of years, I am not able to say.

MR. HERNACKI: Your Honor, at this time I would like to read from Page 1647 of the transcript.

THE COURT: You have permission to do so.

Q. Again, Mr. Flanagan, we will follow the same procedure:

"QUESTION: What did they say after Mr. Wise stopped or finished reciting these various factors on the market which he felt were unsound?

"ANSWER: Going back, in reference to the price of milk to Milgram's, Mr. Pentz made the statement that that particular account 'which is served by both our companies, can be handled between ourselves, Sealtest and us, and the price could go on up', which again indicated, and I say 'indicated', I was sitting there and had to draw my conclusions, that this was not a program, that it, again, was just a deplorable situation, as far as our company was concerned.

"QUESTION: At least, Mr. Pentz was willing to eliminate whatever Mr. Wise objected to in Bordens' relationship with Milgram's, is that correct?"

MR. CHADWELL: Pardon me, Your Honor, it is hard for me to keep up. This last I didn't get, would you mind if he reread that?

"QUESTION: At least, Mr. Pentz was willing to eliminate whatever Mr. Wise objected to in Bordens' relationship with Milgram's, is that correct?

"ANSWER: That's what his statement would lead you to believe. Mr. Edquist, then, upon Mr. Pentz's statement, said, 'I agree with you, the whole market should be on the same basis'."

Were you asked those questions, sir, and did you give those answers before the Grand Jury?

A. I am sure that would be true, if they are in there.

Q. How about that, does that help you some on the question, let's say, of what Mr. Pentz said about the Milgram discount?

A. I am not sure that that was said. I am not sure that there was any reference made to any particular discount or size of discount or to any particular people. Now, I am just not sure that there was. I don't recall that there was.

THE COURT: Does the reading of these questions and answers have any effect upon your present recollection at all?

THE WITNESS: Actually, they don't have. It has been too long ago for me to be able to say this is the case.

(R. 513-523)

Q. Now, Mr. Flanagan, I am going to leave that meeting, and I want to ask you if you were present at a discussion with Mr. Stewart, Mr. Banfield, Mr. Wise, Mr. Gardner, about this same period of time?

A. There have been several discussions, which one are you—

Q. All right. At this one, was Mr. Banfield—do you remember one where Mr. Banfield was instructed to prepare some price studies or price lists or work sheets containing prices, whatever you wanted to call them, was he asked to prepare such a thing?

A. Well, I don't recall him being asked to prepare. I know that we constantly—I will answer you this way: I know that we constantly take a look at our position with regards to our finance at the prevailing price of milk in the market, including any chaotic conditions or discounts ever prevailing. Now, these are in normal type of business study that we have had for any number of years and still do today.

Q. And does Mr. Wise always come into town to direct Mr. Banfield in the preparation of such documents?

A. No, sir, anything of that kind is either a part of his normal duty or, I would say, at the request of Mr. Stewart.

Q. Now, were you present—do you recall such a meeting with those people present about that same period of time when Mr. Banfield was directed to make a study on the price of milk which was not a price then in effect?

A. No, I don't remember that specifically, no, sir.

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Q. Were you present, Mr. Flanagan, at a gathering when Mr. Wise was there, Mr. Gardner, Mr. Stewart, yourself and Mr. Banfield, and Mr. Banfield was suggested or told or directed to prepare a price list which would lower the market from the price prevailing at the time to meet some very low prices then being charged, namely in that period of June, 1958?

A. No, sir, I was not.

Q. Were you ever present in the room when Mr. Wise was there and Banfield was told to make up a projected price list of some sort of any kind?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Or you deny it, which is it?

A. I don't remember of ever being present when Mr. Banfield was asked to make any price lists.

Q. All right. Suppose we call it a price study.

A. Or a price study.

Q. Or a work sheet or work study.

A. No, sir.

Q. Would your answer be any different?

A. No, sir, it wouldn't.

• • •

Q. All right. Were you ever present when Mr. Banfield was asked to prepare a work sheet to show prices which would be almost equivalent to the low prices then in existence in June of 1958?

A. Not as specific direction, no, sir, I have not been present when this was done. This is a thing that we would

normally do, anyway. I think Mr. Banfield very possibly would furnish Mr. Stewart with the—with a study of our business as to how it was being done with regards to the percent at certain figures, if the market is chaotic, or if we are met with better conditions, this would be a normal thing for the office, to furnish Mr. Stewart with our results based on the condition of our business.

Q. Were you ever present at such a gathering of those people that I have named when Mr. Banfield was given certain prices, certain figures, being figures for a half gallon of milk in a paper carton, and told to prepare a work sheet of all the other products in relation to that?

A. No, sir, I was not. I was never in it at a time like that.

Q. Were you ever present in the room when Mr. Wise was there and Mr. Banfield was given any directions on preparing any kind of a work sheet or work study?

A. No, sir, I was not present.

Q. Would it refresh your recollection any if I suggested there were—that he was asked to prepare two price work sheets?

A. I don't recall—

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THE COURT: Why don't you rephrase the question.

Q. Very well. Mr. Flanagan, let me suggest that at such a gathering, Mr. Banfield was asked to prepare two listings of prices and products instead of just one, whether in a work sheet form or any other manner? Do you recall anything like that?

A. No, sir, I do not.

MR. HERNACKI: At this time, Your Honor, I would like to read from Page 1621 of the Grand Jury transcript.

THE COURT: You may do so, continuing over to Page 1622.

Q. We will follow the same procedure, Mr. Flanagan. Again, this is from your 1958 testimony, in October of that year.

"QUESTION: Were you present at the time Mr. Stewart asked Mr. Banfield to work up that price list?

"ANSWER: I was in the room when Banfield and Stewart and Mr. Wise and Mr. Gardner and myself—that was suggested to Banfield that he make it up, yes.

"QUESTION: That would be a price list which would lower the market from the price that was prevailing at that time; it would devise a new price list which would meet the lowest price being charged on the market at that time?

"ANSWER: It would come close to it. It wouldn't be the lowest, but it would reduce the price of milk, yes, it would.

"QUESTION: Did you also ask Mr. Banfield to work up another price list which would elevate the half-gallon up to 33¢ per half-gallon.

"ANSWER: I think that was talked about. Now, the specific price, I'm not certain about that.

"QUESTION: Wasn't Mr. Banfield called in by the gentlemen you have just named, and he was asked to devise a lower price list and also a price list?

"ANSWER: There was two price lists; actually two different studies made."

Were you asked those questions and did you give those answers?

A. Again, sir, I can't recall this interrogation, these questions and these answers. I know you are reading from what I had to say, but for the life of me, I am not able to recall specifically as you read them.

Q. Would you recognize any of your language that is attributed to you in this transcript as being the kind of language you would normally employ?

A. I am sorry, sir, I am not able to help you on that. I don't recall it.

Q. Well, did Mr. Banfield come up with two price work sheets about this period in June of 1958?

A. Again, sir, I don't recall if he did or not.

Q. Well, didn't you ever see one of them, or didn't you see both of them?

A. I have seen many, many studies.

Q. By Mr. Banfield in June of 1958 about this period of time?

A. I have seen many studies. I don't recall when or just what particular studies you are speaking of. I have seen many, many studies on the prices of milk in this market.

Q. Now, Mr. Flanagan, weren't you asked to prepare a discount schedule which would be used in correlation with these same price study work sheets, whatever you wish to call them?

A. You say was I asked? I don't recall being asked to do this.

Q. All right, did you? Did you prepare a discount—

A. I don't recall. Sir?

Q. I say, did you prepare or assist anybody else in preparing a new discount schedule in June of 1958?

A. I would say that any price schedule or a discount schedule that we would have in mind of putting in a market that I would be talked with, I would talk about it, I would help Mr. Banfield in putting some of these figures together, and they in turn would be furnished to Mr. Stewart, so it is not at all unusual for this to be.

Q. Now, I am not interested in what is unusual or not. I want to know what you did at that time.

A. Well, I am not able to recall specifically at this time being any specific discount or any studies that we made. I don't recall them specifically, since we make so very, very many of them.

Q. Weren't two work sheets made up, one of low prices, one of higher prices, and didn't you work with Mr. Gardner to prepare a discount schedule which was contemplated being in effect the same time these prices would be in effect?

A. I don't recall it specifically.

Q. Well, in any general way, do you recall it?

A. No, sir, I don't. As I say, we have done this so many, many—possibly hundreds of time, I don't recall.

MR. CHADWELL: If Your Honor please, I think it is obvious that if Mr. Hernacki wants to inquire as to any particular price sheets, the witness would be aided in seeing them. He is evidently having trouble recalling as to generalities on the subject.

MR. JINKINSON: I agree with counsel, he is having great difficulty in recalling anything, not only generalities but specifics.

MR. CHADWELL: I think it would be helpful if he saw what you are talking about.

MR. JINKINSON: I think we have directed the witness' testimony, Your Honor.

THE COURT: The objection will be overruled, although I think counsel has a distinct point that definitive response to questions relating to price lists in this period of time are quite unlikely to be produced in this witness.

(R. 527 - 538)

Q. Mr. Flanagan, did you at any time in the period of June, 1958, work together with Mr. Gardner in the preparation of a discount or a work sheet of any sort?

A. I may have. It is very possible that I could have. I don't recall specifically.

Q. Specifically, a 7 per cent discount?

A. There was a 7 per cent discount.

Q. Did you and Mr. Gardner together prepare a schedule of a sort?

A. It might have been Mr. Gardner, Mr. Banfield, myself, those that would be in this type of work in our company, very likely could have been.

Q. Do you recall with what kind of a set of prices this discount schedule of 7 per cent would be used with?

A. Not specifically, no, I don't. What figure this—the

discount system would apply to, I don't recall specifically, whether it was a 39 per cent price or 37 or 35. I am not sure.

Q. Was the discount schedule we are discussing prepared in connection with possible use with one of two different price lists then also being prepared, proposed price lists?

A. I don't recall this specifically. Whether—you say two price lists?

Q. Yes. I had examined you this morning concerning whether or not Mr. Banfield was instructed to come up with two price studies or work sheets—

A. Yes, sir.

Q. —two different group of prices of milk products, and I am asking you now whether the discount study, 7 per cent discount study, which you have worked, was used or to be used or was contemplated in connection with those two price studies which Mr. Banfield —

A. I don't recall any two price studies. It wouldn't have been any two particular price studies. It could be any number of wholesale lists. It could have been any number of them.

Q. In connection with the preparation of this discount schedule, what kind of work would be involved on your part or on the part of people who worked under you in Sealtest to prepare it?

A. Well, there would be a tabulation of our customers in category as to their size and how they themselves, in respect to volume, could avail themselves of this discount so that in turn they could be selling their milk at a then competitive price. We take into consideration volume, and the size of our customers, called savings.

There are just many facets to determining what bracket, what percentages and so forth would fit into this type of picture. It is very complex.

Q. Would it be a sort of a trial and error thing in com-

puting a bracket and then seeing how many accounts would fall into that bracket and that —

A. It may be a certain amount of trial or fixing a figure after we arrive at it and it also has to do with figuring what the savings would be to us and the type of customer that would have a considerable amount of business versus one that would have a very small amount.

Q. About how much time would that sort of thing require?

A. Well, it could be quite some length to make a very thorough study.

Q. More than a day?

A. In some instances it could be more than a day.

Q. Could it be as much as three or four days required?

A. In some instances if the material was not available, if our particular studies were not current enough to reflect our business as it was at that particular time, if it wasn't current studies, it could take some time to make this study. It is office detail of compiling figures and so forth, and quantities.

Q. Now, the discount schedule which had been in effect in June of 1958, had been in effect for a number of years prior thereto, had it not?

A. Quite some time.

Q. So this would have been the first discount schedule you were helping prepare in many a day, up to that point?

A. Well, we have made studies continually and analysis of our price structure, size of routes, grouping of customers to size, grouping of customers on their needs in regard to how many half gallons or total points they would buy and the proper distribution of these accounts on proper route structure to keep our drivers' time in line with one another, so one wouldn't have a heavier route, heavier day versus one that have a lighter day, on proper distribution with a minimum number of trucks and men to properly service this general area.

Q. Yes, sir, but you were not making a study directed to the preparation of an entirely new discount schedule

which was going to be contemplated being put into effect in the entire market?

A. No, however, if these figures were available and current, these figures would have been a result of quite — quite a bit of study would be available to us and would be used.

The wholesale business, it would have been appraised regularly to see where it stood in volume and distribution.

Q. Now, I am going to ask you, and what we covered in the morning may help, do you now recall anything about a grouping where Mr. Wise, Mr. Stewart, Mr. Gardner, you, and Mr. Banfield were present, Mr. Banfield being asked to prepare a proposed price study, one price a low price directed to some of the lower prices then in existence in the market and the other price—I am speaking of the half gallon price, being directed to a price then the current list price on the market?

A. I don't recall specifically of any direction of putting this together, but I would say this would be a common practice for us to have this knowledge or to have this type of study for this to be a part of our work day, and Mr. Banfield's duty to have this type of knowledge or information through his study that would be readily available to him at his fingertips with very little amount of work, it wouldn't take long to put this together.

Q. Was Mr. Banfield asked to prepare such a study after this June 13th meeting in the President Hotel?

A. Not in my presence.

MR. HERNACKI: At this point, Your Honor, I should like to read from Page 1628 to 1630 of the grand jury notes.

THE COURT: Yes, would counsel approach the Bench, please?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: I want to advise counsel for the defense that during the noon hour, counsel for the Government

handed me a note designating Pages 1628 to 1630 in the same pattern as those directed this morning. I want to assure counsel that I have studied the grand jury transcript that appears on those pages, and will permit Government counsel to attempt to refresh this witness' recollection by the reading of those pages.

I wanted to be sure that counsel understood that I had studied those and that was the purpose of coming here.

MR. CHADWELL: I appreciate your comment, Your Honor. This is in addition to what the Government had shown you before Court opened this morning?

THE COURT: That is correct.

MR. CHADWELL: I want to renew our motion, Your Honor, and discuss it with the Court, but perhaps it would be better to wait until counsel is finished with this witness, because for all I know, they have some other sections of the transcript to read to him and I have got something I wish to say to the Court with respect to all of them.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Very well.

Q. Again, Mr. Flanagan, we will follow the same procedure. I will read the material then ask you about it.

A. All right.

Q. (Reading): "QUESTION: How long did it take Mr. Banfield to work up this price list that he had been requested to work up?

"ANSWER: I don't recall. It takes—we have made some studies before and it generally takes us sometimes a week. In other words, we make a complete study of our volume accounts.

"QUESTION: We are talking about a specific price list, two price lists?

"ANSWER: Yes.

"QUESTION: Mr. Banfield had been directed by Mr. Wise, was it, to prepare these two price lists?

"ANSWER: Mr. Wise or Mr. Stewart. Between the two, I would say certainly.

"QUESTION: You were present at the time Mr. Banfield was given those instructions?

"ANSWER: Yes, I remember him being asked to work up a study."

• • •

Q. (Reading): "QUESTION: When did you see these studies that he worked up, how long after this meeting at which he was told to do this?

"ANSWER: Well, I would say it could very well have been three days after or four days after. I mean sometime after, and the reason I say that, there was a very, very complete study made of all the accounts that we served of which there were—there are over 900 accounts and we made a complete study of all the accounts, as to their volume they did with us the previous month, so we could know about where we had to fall in our volume discount scale.

"QUESTION: Had Mr. Banfield been instructed to make up price lists and had you and Mr. Gardner been instructed to make up discount schedules?

"ANSWER: No, we all worked on the same thing, I mean we all contributed to it. I am sure Mr. Gardner and myself worked on a proposed volume discount, and I was asked several questions by Mr. Banfield and his office people about various accounts, where they could find the tickets, and what routes they were on and so forth, so we could pinpoint them, and this all took quite a bit of time to transpire. I don't recall how much time, but it is quite a bit of work.

"QUESTION: Three or four days, would that be correct?

"ANSWER: Easily that, to compile that much information.

"QUESTION: Were you given copies of the two price lists after Mr. Banfield had finished his study?

"ANSWER: Yes, there was a carbon copy of it—

"QUESTION: (Interrupting.) Mr. Stewart got a copy and you got a copy and Mr. Wise, I suppose, do you know if he was sent a copy to Chicago?

"ANSWER: I don't know if he was or not.

"QUESTION: Do you remember what the half gallon price was on the lower of the two price lists?

"ANSWER: I would have to make a guess at it. I think it was a 27 cents wholesale list, if I am not mistaken.

"QUESTION: And the higher of the two price lists, what was the wholesale price on half gallons?

"ANSWER: There again it would be a guess, but as I remember, 33 cents."

Mr. Flanagan, were you asked those questions and did you make those answers?

A. Apparently so.

Q. Does that in any way, any portion of it, bring any of this back to you and refresh your memory as to any of these events?

A. Only that I can say again, it is quite typical for us to make studies, either use material that is available to us, or if necessary, make new studies, thorough, to determine these discount brackets.

(R.610-612)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: Mr. Chadwell, at the informal conference last night, we both recalled that you had reserved the right to make a motion for the record in regard to the grand jury transcript, and before we all forget it, I wanted to give you that opportunity this morning to make a motion for the record.

MR. CHADWELL: Thank you, Your Honor. I would like to move, and do move, for the right to inspect the grand jury transcript of the testimony of Mr. Flanagan, who testified yesterday with respect to all matters that were inquired into by Government counsel in the questions designed to

attempt to refresh his recollection, not only the questions and answers which were read to him but all other portions of the testimony relating to the subject matter thereof.

I want to make it clear I am not asking to go beyond the subject matter of the questions and answers which were actually read to the witness, but I felt that I was unable properly to evaluate his testimony in the absence of the complete transcript on those points.

THE COURT: Let the record show that the defense motion will be denied.

The record should also show that the Court read all of the testimony given in regard to a particular subject in regard to all of the questions and answers used for the purpose of refreshing Witness Flanagan's recollection, and that I also checked word for word the Government's reading of the particular questions and answers during the course of Mr. Flanagan's examination. The reading was accurate, word for word.

On another matter the Government has submitted a similar list in regard to possible refreshment of the recollection of the witness Vincent Crimmins about 9:30 this morning, and between 9:30 and now, I have read all of that testimony, both marked in black and in red, as the procedure was outlined earlier in the record, so that it will not be necessary, when and if it becomes necessary to reflect and I take time to read it, but I want to assure counsel that I have read it and will again follow word by word any questions and answers that it might be necessary to read in connection with the refreshment of the witness, Vincent Crimmins.

MR. CHADWELL: May I make a statement to Your honor?

THE COURT: Yes.

MR. CHADWELL: I have no doubt that Your Honor has done just that, and I appreciate that, but nevertheless we urge the motion with respect to the grand jury transcript read to Mr. Flanagan and I now wish to move for the right to inspect the transcript of the witness, Mr. Crimmins, about which Your Honor has just spoken, and I

would like to inspect not only what the Government will read to him but also other portions of the transcript dealing with the same subject matter, and the reason is not that I in any way doubt that the Court has inspected it and will watch to see that the questions are accurately read but in order that I may—or counsel for the Defendants may properly evaluate the transcript and the portions read to the witness, and be better able to cross examine the witness on the testimony.

THE COURT: The Court will make the same ruling in connection with that motion.

VINCENT CRIMMINS
Fairmont-Country Club Former Sales Manager

(R. 636-644)

Q. I would like to show you a document, Mr. Crimmins, in evidence in this case as Government's Exhibit 181-A* and ask you to give us your best memory on when you first saw that document?

A. Well, sir, I—at the time I surrendered this document to the Government, I made a real effort to recall where I got it and I—at that time, I felt that I likely received it from Mr. J. M. O'Bryan out at Christ the King Church at 85th and Wornall. I can't remember the circumstances with certainty, but that was my best idea at that time.

Q. It that your best memory?

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* GX 181-A was a document of unknown origin which Sealtest's accountant testified was "not our list" (R. 1392-96). The document was received in evidence during testimony by Glen Phillips, former Hawthorn-Mellody manager, who testified it was a list or "similar" to a list exhibit by Peterson of Fairmont at a meeting not attended by anyone from Sealtest (R. 352-54). Government counsel claimed that GX 181-A reflected an alleged plan by Sealtest first to lower, then to raise prices, as charged in Count 12. GX 181-A is reproduced on the following page.

GX 181A

		WHOLESALE			RETAIL		
		Present	# 1	# 2	Present	# 1	# 2
Homo	Qt.	17	14	18	21	17½	21½
Homo	½ Pnt.	6					
Homo	½ Gal.	33	25	33	40	32	40
Homo. Gal	Bulk	74	50	66			
Homo. Gal	Disp.	79	55	71			
Regular	Qt.	17	14	18	21	17½	21½
Regular	½ Gal.	33	25	33	40	32	40
Regular Bulk	Gal.	74	50	66			
Light Cream	½ Pnt.	20¾	15	19	26	23	?
Light Cream	Qt.	78	56	72			
Light Cream	Gal.	31½					
Heavy Cream	½ Pnt.	31¾	25	31	39	35	36
Heavy Cream	Qt.	1.32					
Half & Half	Pnt.	26¼	25	25	31	29	30
Half & Half	Qt.	51½	49	49			
Sour Cream	8 Oz.	26	20	25	29	25	30
Choc. Milk	½ Pnt.	6½	6	6½			
Choc. Milk	Qt.	21¼	14	20	25	19	24
Skim	Qt.	17¼	12	16	22	15	20
Skim	Gal.	56	48	64			
Orange Drink	½ Pnt.	5	6	6			
Orange Drink	Qts.	16½	18	18	21	23	23
Buttermilk	½ Pnt.	5½	5	5½			
Buttermilk	Qt.	18½	12	16	24	16	20
Buttermilk	Gal.	78					
Cr. Cott. Cheese	Lb.	19	19	19			
Cr. Cott. Cheese	2 Lb.	36½	36	36	43	43	
Cr. Cott. Cheese	12 Oz.	17¼	17	17	22	22	22
Dry Cottage Cheese	Lb.	16	13	18			
Dry Cottage Cheese	12	16¼					
2%	½ Gal.	29	22			29	

500 To 1500	2%
1500 To 2000	3%
2000 To 2500	4%
2500 To 3000	5%
3000 To 3500	6%
3500 Up	7%

Central Billing & Advertising Allowance 3% 2 or more stores qualify

July 58 [handwritten note]

A. Well, as I say, I can't remember it with certainty, but I know I got some papers from him there and I thought that probably was it.

Q. Now, at the time you received this document, did you have occasion to have a conversation with Mr. O'Bryan?

A. I don't recall any conversation about it. There were conversations later, it was in our office, and there were discussions in the industry later about it, but I don't remember any specific conversation at that moment.

Q. Did you have a conversation with Mr. O'Bryan about the proposals shown on Exhibit — well, strike that, I will withdraw that question. Did you have a conversation with O'Bryan with reference to the figures shown on Government Exhibit 181-A?

A. Well, as I say, it was discussed in the industry and I discussed with Mr. Peterson and with others, and I can't remember at the present moment a specific discussion on that subject.

Q. Did you have such a conversation with Mr. O'Bryan?

A. I just can't remember that particular conversation.

Q. Did you appear before the Federal Grand Jury —

A. I did.

Q. — when they were investigating that matter?

A. Yes, sir, I did.

Q. On July 1, 1959?

A. I don't remember the exact date, but I remember appearing.

Q. At that time you appeared, you were asked certain questions and you made certain answers?

A. That's right.

Q. Now, in an effort to —

MR. EISEN: If the Court please, I would like to, at this point, attempt to refresh the witness' recollection of his prior testimony before the Grand Jury.

THE COURT: What pages do you have in mind?

MR. EISEN: Page 2310.

THE COURT: Yes, you may do so.

Q. Do you recall at that time that you were asked certain questions and made certain answers?

A. I do.

Q. I would like to read from Page 2310 of the transcript of your testimony, Mr. Crimmins.

"QUESTION: Do you have any recollection as to the conversation that you had with the person who gave it to you at the time you received it?

"ANSWER: Well, I believe, now, to my best recollection, that it came from a representative of Foremost Dairies saying that, 'This is a proposal for market changes by Mr. Ray Wise,' an official of the Sealtest Company, as you understand. I didn't see Mr. Wise, but it was handed to me as one of his proposals.

"QUESTION: Was it Mr. Callender who gave this to you?

"ANSWER: I don't believe it was Bill Callender, I believe it was J. M. O'Bryan." Does that refresh your recollection, Mr. Crimmins?

A. Yes, I would agree with that, that was my opinion at that time, and no doubt my memory was more vivid then than now. I would not dispute that.

THE COURT: Mr. Crimmins, the purpose of counsel reading those questions is to actually refresh your recollection and the Court wants to be certain that having had this material read to you, whether your recollection is really refreshed and that you recall that that is true?

THE WITNESS: Your Honor, I can't recall the circumstances of his handing it to me. At the time — or any circumstances of him handing it to me. At the time that I was asked about this document, where it was obtained or where I could have received it, I did my best at that time to try to reconstruct in my mind where I might have received a thing like that and I am doing so now, but I can't remember any words or the position of where we — just at the moment, what transpired at all.

THE COURT: Did the questions counsel asked you and the answers he read correspond with your present recollection of what you have been able to reconstruct as best you can?

THE WITNESS: Well, Your Honor, I made a sincere effort to reconstruct the matter pertaining to this document and I am certain it was in our office, it was in my file. I am not absolutely certain where it came from, where I received it. At the time I testified before the Grand Jury, I tried my best at that time to go over the events which transpired and try to figure out the best — in my opinion, the best place or the place where I thought it came from.

THE COURT: What I am really getting at, are you willing today, from your present recollection, to adopt what you said before the Grand Jury as the best effort that you could make?

THE WITNESS: At that time, yes.

THE COURT: Yes, all right.

Q. Now, does this testimony also, Mr. Crimmins, refresh you as to whether or not you had a conversation with Mr. O'Bryan with reference to the proposal at that time, the time you received the document?

A. At that time, I can't recall any conversation with him at that time, but that document, at this moment I can't.

MR. EISEN: If the Court please, I would like to just continue on to the next question in the course of his transcript to see if its refreshes his recollection.

THE COURT: You may, at the bottom of Page 2310 down approximately half-way to 2311.

Q. (Reading:) "QUESTION: Was it Mr. Callender who gave this to you?

"ANSWER: I don't believe it was Bill Callender, I believe it was J. M. O'Bryan.

"QUESTION: When Mr. O'Bryan gave it to you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked "Column 1" there—

And that is apparent, from the record, that the Examiner pointed to, indicated "1."

A. Yes.

Q. (Reading:) "ANSWER: (Interrupting.) That is right.

"QUESTION: (Continuing.)"—

MR. McLAREN: Excuse me, Your Honor, may we have that back, up to the point of the "Interrupting?"

MR. JINKINSON: You want to have him read it back?

MR. McLAREN: I want the reporter to read it. (The record was read by the reporter as follows: "Question: When Mr. O'Bryan gave it to you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked "Column 1" there—And that is apparent, from the record, that the Examiner pointed to, indicated "1.")"

THE COURT: Mr. McLaren, do you understand—

MR. McLAREN: I couldn't tell what counsel was interpolating in there, if anything, about the pointing.

MR. JINKINSON: Let the record show that he was pointing at "Column 1" on the Exhibit 181.

MR. McLAREN: Is that in that record?

THE COURT: Yes, this is in this record, and what counsel is attempting to do is to aid the witness in attempting to refresh his recollection by doing the same thing that happened, and it is obvious from the transcript that at the time you were examined before the grand jury he showed you this record and pointed to "Column 1," and Mr. Eisen is doing the same thing in order to reproduce the best he can the same situation.

I was about to suggest he hand you No. 1 because I am sure you had that in your hand when you were testifying before the grand jury.

THE WITNESS: That is true.

THE COURT: Let me pick up so the jury will catch the full sequence.

Mr. Eisen had read these questions — or rather this question: "QUESTION: When Mr. O'Bryan gave it to

you, did he state that the two price lists appearing on this sheet of paper, one was to go into effect first, the one marked, quote, Column 1, end quote, there."

"ANSWER: (Interrupting.) That is right.

"QUESTION: (Continuing.) — and that later on the prices shown in the second column were to go into effect?"

You may continue, Mr. Eisen, from that point.

Q. (Reading:) "ANSWER: That was my understanding, yes, sir.

"QUESTION: And that this proposal made by Mr. Wise as a means of stabilizing or straightening out the price structure in Kansas City?"

I would like to correct the record on that. I misread that.

"QUESTION: And this was a proposal made by Mr. Wise as a means of stabilizing or straightening out the price structure in Kansas City?

"ANSWER: That is right. I have no doubt of the source of information. I can't recall with certainty that it was handed me by O'Bryan, but I think it was, and I know I had no doubt about this was a reliable source of information."

Now, Mr. Crimmins, does the reading of your prior testimony now aid you in recalling that you did have a conversation with Mr. O'Bryan about the proposal shown on Government Exhibit 181-A?

A. Well, sir, it is my opinion now that when I pointed to this list before the grand jury that I was saying, this was the plan, not necessarily that I had a conversation with Mr. O'Bryan but this was a market plan or proposal for straightening out the market, and I cannot at this moment recall discussing this matter with Mr. O'Bryan, but I remember that I — as I stated there that I had this in my possession and that I felt that it was a proposal to follow this pricing in the market.

EDWARD H. GILMORE
Hawthorn-Mellody Dairy Former Sales Manager

(R. 785-799)

Q. Now, Mr. Gilmore, directing your attention to the summer of 1958, did you, in the course of your duties and employment and in the trade, hear of what was referred to as the Wise Plan for the Kansas City market?

MR. LASHLY: Of course, Your Honor, I will object to that question. If he heard rumor in the trade, I believe, is not proper evidence in the case.

THE COURT: Objection overruled. I think he can testify whether he heard of anything that was referred to as that and then I would require the witness to testify where he heard it, from whom he heard it and the circumstances under which he heard it. I will permit the general question. You may answer, Mr. Gilmore.

A. There was conversation in our office in regard to a program presented by the Sealtest Company, in our own company. I heard the information from Mr. Phillips, is where I got the information that I had in regard to what they — at that time, what they called a program such as that.

Q. And did you at the time in question see in Mr. Phillips' office a list or a sheet which was the Wise Plan or the Wise proposal?

MR. LASHLY: I object, Your Honor —

THE COURT: I will sustain the objection here. This witness testified he heard about a Sealtest plan, not a Wise Plan. You may make inquiry as to what he saw, but let the witness testify and not put words in his mouth. Objection sustained.

Q. Mr. Gilmore, was the plan which you just testified to at any time referred to as the Wise proposal?

MR. LASHLY: Object again, repetitious, Your Honor. He has already testified twice on that subject.

THE COURT: I do not think this question has been asked. You may answer that question.

A. To the best of my — I can't recollect what it was called. It was a program set up, or that Mr. Phillips discussed with me, that it was a program set up to try to get the marketing straightened out, or something to that effect. I can't recollect what — that it was called the Wise Plan or anything like that. I mean, that I remember that it was a program and I saw a list there, a price list, and I can't remember what was on that price list.

Q. Now, directing your attention to the early part of August, 1958, Mr. Gilmore, did you have occasion to attend a meeting at The Town House Hotel in Kansas City?

A. I attended a meeting at the Town House Hotel, yes, but I can't tell you what date it was.

Q. Was it approximately that time?

A. It could have been. I mean, as far as I know, it was along in there some time.

Q. Will you please tell us who, other than yourself, was present at that meeting?

A. Mr. O'Bryan was there with the Foremost Dairy, Mr. Vincent Crimmins with the Country Club Dairy, Mr. Jack Felts was there from the Borden Company, Mr. Phillips and myself, that I definitely remember was there.

Q. Was Mr. Augenstein of the Borden Company there?

A. That I don't remember, whether he was or not.

Q. Do you know how this meeting was arranged, Mr. Gilmore?

A. No, I do not. I was asked by Mr. Phillips to go with him to attend a meeting.

Q. Will you please tell us what the conversation was, what the parties said at that meeting?

A. I can't give you any definite information that anybody — any specific person said, but I do know that everybody participated in the meeting.

Q. What was said?

A. The meeting was held to try — the prices had been down so long, and we had gone along with the programs trying to get the marketing straightened out and the gist of the meeting was to determine if we could go up on our

products and if Sealtest and the other companies would go along with us so that we would have a fair margin of profit in our dairy products. We had been operating at a loss so long, we was trying to figure out some way of getting our products sold at a profitable price and that was the gist of the entire meeting.

Q. And was Mr. Wise's name mentioned in connection with that lowering of prices at that time?

A. I can't definitely say that it was, no.

Q. Mr. Gilmore, did you speak to me yesterday afternoon and again this morning about what your testimony would be before this jury?

A. Yes, sir.

Q. Do you recall what you told me your testimony would be?

A. I told you at the time that I —

MR. LASHLY: You Honor, may I interrupt? May I approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. LASHLY: This appears to be an attempt on the part of counsel — an opening of an attempt on the part of counsel, to impeach his own witness, and I want to know if the Government takes the position that this is a hostile, adverse witness?

MR. JINKINSON: Yes.

MR. LASHLY: And if so, what is the basis?

THE COURT: Is this an effort to impeach or an effort to refresh his recollection?

MR. JINKINSON: First to refresh his recollection, we are going to ask him if he recalls he said this. If it doesn't refresh his recollection, then we will ask the Court to impeach him.

THE COURT: Well, you don't get to that point unless he denies what he said.

Incidentally, the record can show at this time that about 9:30 this morning, in connection with the witness, Gilmore,

the Government directed my attention to all of his testimony before the Grand Jury and particular portions as to matter and material that might be desired for refreshment on Pages 2141 to 2142, and I want the record to show that I have read not only that matter, but all other related matter as they appear on Pages 2141 to 2148, so that if we get into that, you will know that I have checked it. That is a little apart from this question, but I think we will probably get into that pretty quick, too.

MR. LASHLY: First of all, I would like to renew the motion that Mr. Chadwell has heretofore made with reference to our right to inspect these minutes.

THE COURT: I understand that.

MR. LASHLY: Second of all, Your Honor, I want to strenuously object to the Government's procedure here. This witness is —

THE COURT: You mean as far as the question that is presently under examination?

MR. LASHLY: Yes, Your Honor. This witness is not a co-conspirator, his company is not a co-conspirator, he has no connection with any of the defendants in this case. If the Government, in talking to this witness before he takes the stand, concludes that his testimony would be in conflict with his Grand Jury testimony, they have no right to bring him to the stand and begin to refresh his recollection from prior testimony and impeach him and use by this means a device of introducing into evident his Grand Jury testimony.

THE COURT: I am going to permit the present question, because it calls for an answer as to what he did or did not say his testimony was going to be, and I think a party is entitled to know whether a witness is going to change within twenty-four hours of what he says he is going to testify to.

MR. LASHLY: May I inquire of the Government what their position is, Your Honor?

THE COURT: Sir?

MR. LAWHLY: I would like to inquire of the Government what its position is with reference to this witness.

THE COURT: I think — what did he tell you?

MR. HOWARD: I will tell you. He said, quote — as he put it, and I want the record to show that at my suggestion —

MR. CHADWELL: I think you are going a little loud.

MR. HOWARD: — at my suggestion — thank you —at my suggestion, he wrote down the way he would put it on a sheet of paper, so that there would be no question that anybody would put it in a certain way or a certain word would be used that I might have inadvertently suggested in the examination.

THE COURT: Do you have that memorandum with you?

MR. HOWARD: He has it, but I copied it down. He has it in his own handwriting on his own paper. "All parties present discussed—"

MR. CHADWELL: Which period are you talking about?

MR. HOWARD: This is the Town House meeting—"discussed the Wise proposal that we had gone along with the lower prices and now what could be done to get cooperation from Sealtest to get prices high enough to get a fair profit."

THE COURT: He may testify to that now. I want to see whether he is or is not.

MR. CHADWELL: In the first place, you referred to the Wise Plan. He didn't adopt your language. I don't see there is anything inconsistent, the fact he wouldn't call it the Wise Plan.

THE COURT: I understand what the situation is. I am going to permit the question to go forward and see what this witness' testimony is going to be. I don't feel up to this point that the witness gives any impression as being other than careful.

MR. CHADWELL: I don't either, he certainly does not.

THE COURT: I think that is right, but I think we

will find out very, very quickly whether that first impression is an accurate one or not.

MR. CHADWELL: I don't think the fact that he disagrees with counsel means that he is hostile.

THE COURT: I don't think he has disagreed with counsel thus far.

MR. CHADWELL: He has not.

THE COURT: But he might, that is what I want to find out.

MR. CHADWELL: Even if he does, Your Honor, I just want to protest against the effort that the Government is making constantly by leading questions and otherwise to refer to the Wise Plan when the witnesses don't. I think it is prejudicial and inflammatory. I don't think that counsel should be permitted to continue to do it.

THE COURT: I don't think there has been any leading questions that have been harmful at all except in the characterization of the Wise proposal, and I think the record shows that the Court stopped counsel in connection with that on objection of counsel. Other than that, I don't think the questions have violated the informal rules that we discussed last night to move the case along. The problem of leading questions gets to critical questions and whether this was the Wise proposal or whether it was not the Wise proposal, it was a critical question, and for that reason, I sustained the objection and I will continue to do so.

MR. HOWARD: May the record show, Your Honor, in regard to the statement I made concerning what the witness told me—

THE COURT: Yes, you can develop that.

MR. HOWARD: That he said to me that at the time that they were discussing the going down of prices, that Mr. Wise's name and his plan and proposal was used. But when it came to the time that they were talking about going upward, then only the name Sealtest was used.

THE COURT: That is basically consistent with what he testified before the Grand Jury. The difficulty was that

you began to ask him questions in that context before he so testified from the witness stand and you got ahead of your witness and you can't get ahead of him until he testifies.

Very well.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(Pending question was read by the reporter.)

THE COURT: You may answer that question, Mr. Gilmore.

A. What was the question? Do I recall that I told you what my testimony would be? I told you that I would say that in this meeting it was discussed as to how we could get our price — our prices had been down. We had gone along with the programs where prices had been down, and we had gone along with the programs to try to get it straightened out and what could we do to get the prices up, and if Sealtest would go up so that we would have a fair margin of profit on our dairy products which we had been operating at a loss for a long time, and that was the gist of the meeting to the best of my knowledge of remembering.

MR. HOWARD: May I inquire further?

THE COURT: Yes, you may inquire further.

Q. Mr. Gilmore, didn't we discuss and didn't you say that regarding the lowering of the prices that the Wise proposal or Wise program or Wise plan was referred to at that time but then when you talked about raising the prices, only the name Sealtest was mentioned. Did we discuss that?

A. Yes.

Q. And that is what you told me?

A. Well, to the best of my knowledge — I mean I can't tell you. I don't remember what happened in there.

Q. Is that what you told me?

A. Yes. Here's the thing. We was going over my testimony that I made in the grand jury. That was three

years ago. And you asked me today what I remember that went on there. What I testified then was a lot closer to the time now for my answers directly today in regard to that. Sure we had discussed that plan and we discussed it in the office before we went over there, or prior to the time of this meeting, and the prices were down, but the purpose of the meeting was to try to figure out some way to get them prices up.

Q. And that plan —

A. Had gone down, we was down, we were at rock bottom then and down to where we was losing money and we had gone along with the plans, where the prices were down, and our purpose was to try to figure out some way to get the prices up so that we could have a legitimate profit instead of a loss.

Q. But in our conversation, you did tell me that the Wise plan or program or proposal, whichever phrase you care to use, and the name of Mr. Wise was actually discussed when you said you went down on the prices and that only the name Sealtest was used when you were talking about going up, trying to get Sealtest to go up?

MR. LASHLY: Your Honor, I again object to the use of that phrase.

THE COURT: Mr. Gilmore, let me ask you this question: As you presently recall the discussions that went on then, both in your office and at the meeting at the Town House, and in connection with your testimony here today in which you referred to a plan, is there any distinction in your mind as to whether in the general conversation, as you presently recall, between what would be referred to if it was referred to as the Wise plan or what would be referred to as the Sealtest plan, or whether there was any real differentiation because I assume everybody knew that Mr. Wise did work for Sealtest?

THE WITNESS: That is right.

THE COURT: Now, in the discussion of this plan, did you understand there were two or possibly three different

plans, or what is your real recollection at the present time as to whose plan this was, if anyone's, and what the parties referred to it and what you understood was under discussion?

THE WITNESS: Well, to the best of my recollection today, I mean it was only general conversation in the industry that there was a program. As far as it being the Wise plan, that don't really ring a big bell with me. I mean there was conversation of not only Mr. Wise's but other people's names involved in that two-year period or year and a half period that we had all this problem. The prices were up and down everywhere, but there was conversation that there was a plan put out by Mr. Wise or supported by him and the Sealtest Company to bring the prices of milk down to eliminate all the fringe problems and all the headaches, that we had to get it — straighten it out, than there was steps to bring the price back up.

The purpose of the meeting was that, to the best of my ability to remember, was that we had gotten down to the bottom, we was clear down. What we was trying to do then was to determine among ourselves, which they were not present and the people that was trying to figure out some way to get these prices back up and our only purpose at that meeting was to study this, and figure out what we could do to bet the prices back up to where we just get an ordinary legitimate profit, which we had been operating at a loss for such a long period of time and the companies we worked for — that I worked for was concerned with, myself, and Mr. Phillips, and they was starting to get back in the money and they was trying to work out something to get these prices up to where they would be stable, and that was the purpose of the meeting and that was what was discussed.

Now, whether it was referred to as the Wise plan or the Sealtest plan, I can't definitely say today. I don't remember that distinctly on that particular meeting or on that meeting. That is the one that I attended.

(R. 822-823)

(CROSS-EXAMINATION)

Q. Now, Mr. Gilmore, you were testifying here under direct examination by the Government that the price of milk went down in July of 1958, if I recall correctly, did you not, and that thereafter you attended a meeting at the Town House and talked about its going back up and so on?

A. I don't remember any specific dates on it. I would hesitate to say when it went down. I know the prices were down, up and down, in that period of time.

Q. By the time you went to the meeting at the Town House, the price had come down — by the time you went to the meeting at the Town House, the price had already come down, it was down then?

A. The prices were down in that period of time. Now, what they were at the time this meeting took place, I don't know.

Q. You think it possible that that meeting could have occurred, we will say, in early June of 1958?

A. As I answered him, I don't remember the date of the meeting.

Q. It could have been in June or it could have been in August, you just don't know; is that a fair statement?

A. At this time, I mean with the time that has elapsed, I don't remember the date when that meeting took place.

(R. 824-829)

(COLLOQUY OFF THE RECORD.)

THE COURT: Let the record show that in connection with the utilization of any Grand Jury testimony for the purpose of refreshing the witness' — this witness or any other witness' recollection, that the objections and motions made by the defense shall be considered as a continuing objection in regard to the use of Grand Jury testimony at any time by any witness.

MR. CHADWELL: The motion is what I am more interested in.

THE COURT: And the motion shall also be applicable to the utilization of that testimony as heretofore stated in the record.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q. First, may I ask you, Mr. Gilmore, you recall stating in your direct testimony that your best recollection that the Town House meeting you testified about occurred during the early part of August, 1958?

A. I think that I said I can't remember when the date of that was, and I don't, really, I don't remember the date of that meeting.

Q. Did you testify before the Federal Grand Jury that was investigating this case?

A. I did.

Q. And solely for the purpose of refreshing your recollection, I would like to read part — from part of the transcript the following questions and answers, reading from transcript Page 2139:

"QUESTION: He attended those meetings alone?

"ANSWER: That's right — wait just a minute, I will correct that one statement. Right at the tail end of it I attended one meeting with Mr. Phillips but I can't remember now for sure where it was, but I think it was at the Town House in Kansas City, Kansas, that I attended one meeting there with him."

THE COURT: Pardon me just a minute, Mr. Howard.

Mr. Gilmore, in order that you get the context in which the questions and answers that have just been read to you, you had been examined just prior to this as to whether or not you had personally attended a meeting at the Ambassador Hotel and you indicated that you had not. Then you were asked whether you had attended any meetings except Union meetings with Mr. Phillips, and you indicated that

Mr. Phillips had not asked you to attend meetings. And then the question — and I will re-read those:

"QUESTION: He attended those meetings alone?

"ANSWER: That's right — wait just a minute, I will correct that one statement. Right at the tail end of it I attended one meeting with Mr. Phillips, but I can't remember now for sure where it was, but I think it was at the Town House in Kansas City, Kansas, that I attended one meeting there with him."

That brings you up to the point and counsel will read the other.

MR. HOWARD: Thank you, Your Honor.

"QUESTION: When did that meeting take place as best you can recall?

"ANSWER: That was in the latter part of 1958, the meeting I attended then.

"QUESTION: Was that just before prices went up on October 1?

"ANSWER: No, that would have been before then, it was probably in September.

"QUESTION: Do you remember prices went up on August 27th to a 33¢ level?

"ANSWER: That's right, that could have been one.

"QUESTION: Just before the price change?

"ANSWER: That's right.

"QUESTION: Who attended that meeting?

"ANSWER: Mr. O'Bryan, Mr. Phillips, myself, Mr. Crimmins, Mr. Jack Felts, if I remember correctly, and I can't remember anyone else attending that meeting."

Now, Mr. Gilmore, do you recall that those questions were asked of you and that you gave those answers at that time before the Federal Grand Jury?

A. If they are there, no doubt that those questions were asked me at the Grand Jury. I remember them asking me about a meeting at the Town House Hotel, that is true, and asked me who was there. But I mean the date that I gave them that the meeting took place, I don't remember what

I told them because I don't remember today when the meeting was.

Q. Well, the reading by me of these questions and answers from your Grand Jury transcript refreshes your recollection as to what you testified then?

A. That's right, and I told the people — I told them at the time and that is the way it actually happened and that was as close to the date as I could get. That is true.

Q. And that is the same testimony you would have today having been refreshed by this?

A. If I could have remembered it, then that would have been the date that I would have give you today. I would have given you the same thing. But that was three years ago that I was examined by the Grand Jury. And being out of the dairy business, I have dismissed it. I couldn't tell you, but if that is what I testified there, then that is right. That was when I went to the meeting, as close as I could give them at that time.

Q. Well, do you recall that you were asked these questions and that you gave these answers at that time?

A. Yes.

Q. What is your answer?

A. Yes.

MR. HOWARD: Thank you.

THE COURT: Any further questions?

MR. HOWARD: I have no further questions.

ARTHUR AUGENSTEIN
Borden General Manager

(R. 997)

Q. Mr. Augenstein, did the time come when you heard about a discount offer to Milgram Food Stores by Meyer Dairy, subsidiary of Hawthorn-Mellody?

A. Yes.

Q. When did you first learn of it, sir?

A. I am not sure of the exact date, but I would estimate around August of 1957.

Q. From whom did you hear of it?

A. Stuart Wien.

(R. 999 - 1023)

Q. And I take it you have related what amounts to a series of conversations?

A. It was more than one. It was two or three, at least, calls that we made before we were able to be fairly well convinced that he had a 13 per cent discount offer.

Q. Did you grant the Milgram Food Stores the same type or a similar type discount?

A. We did later.

Q. About when?

A. October 1, 1957.

• • •

Q. And how did it come about that you did grant them the 13 per cent discount?

A. They indicated to us that Sealtest was giving them an increased discount.

Q. At this time, in October of 1958, what dairies were supplying the milk of Milgram in Kansas City, Missouri?

A. Sealtest and Borden.

Q. And in what ratio were you supplying that account?

A. We never knew what Sealtest sales were. We only knew what our own had been.

• • •

Q. Did you attempt to verify that statement, the truth of it, before you offered him the discount?

A. Yes, I did.

Q. What did you do?

A. I saw Glen Phillips one day after some dairy counsel meeting, I think, at the Union Station.

Q. I am sorry, sir, I am not sure I communicated with you. Did you attempt to verify the fact that Sealtest had given the discount to Milgram Food Stores?

A. Yes.

Q. And how did you do that?

A. We went to Chicago. Mr. Pentz — I had, of course, kept Mr. Pentz, my immediate superior, informed of the discussions that I was having with the Milgram people, and he wanted to know whether I had verified it with Sealtest. I said I hadn't been able to. So in September of 1957, Mr. Pentz asked me to meet him in Chicago, and we went to see Mr. Wise, and at that time we tried to verify from them if they were giving a discount to Milgram or whether they had heard of the discount.

They had, but we were never able to find out from them anything concerning the discount other than we felt that the 13 per cent figure apparently was the amount.

Q. All right. Now, let me back up with you a moment. After first learning from Mr. Wien that such an offer had been made, did you have a discussion with Mr. Phillips?

A. Yes.

Q. And who is he?

A. He was manager of the Meyer Sanitary Milk Company.

Q. Where did you discuss the matter with him?

A. In front of the Union Station.

Q. About when?

A. I frankly can't recall the date.

Q. Can you place it in terms of when you first learned of it from Mr. Wien?

A. Yes, somewhere in August.

Q. Not too long afterward?

A. That is correct.

Q. Will you relate the conversation you had at that time between yourself and Mr. [Phillips]?

• • •

A. I asked Mr. Phillips if they were quoting a high discount, that I had heard of 13 per cent, and as I recall, I looked him right in the eye and he said, "No," and I think I repeated the question and again he said, "No."

Q. What else, if anything, did you say to him, sir?

A. I think I stated that if what I had heard that there was a higher discount, that my query was how they could justify that great a discount.

Q. At the time of this conversation had you ever been advised of the 13 per cent figure?

A. We were pretty sure that that was what it was. I don't recall if we knew exactly at that time. Frankly, I never did — we never did get anything to definitely set up that it was a 13 per cent offer.

Q. What else, if anything, was said at that discussion?

A. In substance that is about all the conversation. It wasn't a very long conversation.

Q. Did you state to him that if there was that much discount possible, that your prices were too high?

A. I could have made a statement along that line, because we operate normally with a very narrow margin of profit, and it allows only small discounts, that if there is a large discount then there must be too much margin in our business and we normally have never operated with anything except a very narrow margin.

Q. Did you suggest that it might lead to a reduction in prices?

A. I don't think so.

Q. What is your best memory on this particular topic of what you said to Mr. Phillips?

A. I don't recall any more than what I stated, sir.

Q. Well, did you say that if he could offer such a large discount that the logical thing to do would be to reduce prices?

A. I don't believe I have ever made that kind of a statement.

Q. But is there a possibility you could have made such a statement, sir?

A. I don't think so, because through all of this period we never — my company, and myself, never reduced prices.

The only time we made any price change was when we had proof that we were meeting a competitive price.

MR. HERNACKI: At this time, Your Honor, the Government would like the opportunity of attempting to refresh the witness' recollection by reading from Page 2283 and 84 —

THE COURT: Yes, the last question on 2283 down to the middle of 2284.

MR. HERNACKI: Correct, sir.

MR. PURCELL: May we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. PURCELL: I realize the Court has ruled on this, but we want to renew our motion previously made as to the similar grand jury testimony, that is, that the defendants be permitted to inspect and examine and be aware of not only those portions marked by the Government and to be read to the witness, but those relating in any way to such portions.

MR. JINKINSON: Couldn't we have a standing objection to this —

THE COURT: There is a standing objection.

MR. PURCELL: It is not an objection, it is a motion.

MR. JINKINSON: Well, motion.

THE COURT: The record may also show that the defense may have a standing motion to the utilization of any grand jury testimony in the manner in which we had proceeded up to this point.

MR. JINKINSON: Yes.

MR. CHADWELL: Very well.

MR. JINKINSON: Without the necessity of making a record every time.

MR. HERNACKI: Could I trouble you for the date of the grand jury session?

THE COURT: Your present one is Volume 13, June 30, 1959, Pages 1028 to 1172. You also have Volume 8, which is Pages 1356 to 1544, October 20, 1958; Volume 15, Pages 2525 to 2603, July 2, 1959. . . . Those are the ones you have indicated on the prior memorandum. The record should show I have read all those pages. I want the record to show that I have read all the suggested passages and I want to call Government counsel's attention, in the hearing of counsel for the defense, that I will not permit the Government to read point No. 10 on Pages 2303 and 2304 for the reason that I do not think that the testimony there could reasonably be said to tend to refresh the witness' recollection on that point.

I will be glad to hear you out of the presence of the jury, but I think if you will check that, you will agree with me that that is true. Either that or I misunderstand what you are getting at.

• • •

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. Mr. Augenstein, you testified before the Federal Grand Jury here in Kansas City several times, did you, sir?

A. Yes, sir.

Q. And you recall that one of those occasions was June 30, 1959, sir, thereabouts?

A. Yes, sir.

Q. I should like at this time, Mr. Augenstein, to read to you a portion of the testimony given at that time and then ask you some questions about it, sir.

"QUESTION: Do you recall telling him"— now this referring to the discussion with Mr. Phillips —"that there was a good possibility that this large discount that he was granting to Milgram's and if it was not withdrawn that a price break was liable to occur on this market?

"ANSWER: As I recall, now that you mention that, I probably stated to him that if there was that much discount

possible, that our price was too high, and the logical thing to do was to reduce the price.

"QUESTION: So you warned him that that might be the consequence of his large discount offer if it was not withdrawn?

"ANSWER: Yes, that was my personal feeling that if we were making so much money on milk, then our price was too high, if we could afford to give that type of discount.

"QUESTION: And you so stated to Mr. Phillips?

"ANSWER: I believe that is right."

Were you asked those questions, Mr. Augenstein, and did you give those answers before the grand jury?

A. My memory at that time would be clearer than it is at the present time. If I stated that, that is as I recalled it at that time.

THE COURT: Mr. Augenstein, let me ask you if having had those questions and answers read to you refreshes your recollection at this time as to what you told Mr. Phillips on that occasion?

THE WITNESS: Not any clearer, I don't believe.

THE COURT: Well, as clear. That is what I am getting at.

THE WITNESS: It has been a long time ago and my first statement was "as I recall it," and what they read to me apparently was as I recalled it at that time.

THE COURT: Do you remember, presently recall it now, having heard that testimony read to you?

THE WITNESS: Makes it no clearer, actually, in my mind.

THE COURT: Well, I don't quite understand your answer as to whether it makes it as clear.

THE WITNESS: Well, things that happened back at that time are rather hazy to me at this time, and if I made the statement in front of the grand jury that he read to me, why, that is as I recall it, and maybe more accurate than my present recollection.

THE COURT: Very well.

Q. Mr. Augenstein, you related that you had gone to Chicago to see Mr. Wise, you and Mr. Pentz?

A. Yes, sir.

Q. Did that occur about September 10, 1957?

A. That is correct.

Q. And where did you go — this is in Chicago, is it?

A. Yes, sir.

Q. Where did you go in Chicago to see Mr. Wise?

A. Mr. Wise's office.

Q. And this was at what time of the day?

A. Oh, I would estimate 10 o'clock in the morning.

Q. When you arrived, who did you find there?

A. Mr. Stewart, Mr. Flanagen, Mr. Wise and Mr. Gardner.

Q. Mr. Stewart, is he here in the room?

A. Yes, he is.

Q. About where is he sitting?

A. He is sitting right there in the last row (indicating).

Q. Next to Mr. Wise?

A. Yes, sir.

Q. Will you state what the discussion was as best you can, telling us what party said what at this time?

A. Well, as I recall the meeting, Mr. Wise did most of the talking. He reviewed the market in Kansas City from the early forties with the reduction of paper up to the present time, which included the introduction of gallon jugs in the Kansas City market. He had some idea of the volume, apparently, of gallon jugs. I don't recall the exact figure that they thought gallon jugs represented as percentage of sales, somewhere between 8 or 10 per cent, I believe, and I, of course, didn't do much conversing in this meeting, but I do recall stating that I thought the figure was too high. I had called the market administrator, I believe in August, and asked him because he had the only accurate figures that were available in the market.

Q. Why did you call the market administrator to find out, sir?

A. Well, I was interested in knowing how big the gallon jug sales were in the Kansas City market.

Q. Did you anticipate some point would be made of that figure?

A. No.

Q. Would you proceed with your relation on the conversation in Mr. Wise's office?

A. The figures that I got from the market administrator, as I recall, was somewhere between 2 and 3 per cent.

Q. This is the share of the total milk sales had by the gallon jug operators?

A. By the gallon jugs. In substance, that pretty well covers the conversation.

Q. What you have just stated is what Mr. Wise stated at the meeting, the discussion about the history of the market and such?

A. Yes.

Q. Now, what was — what point did Mr. Wise make as he related this history, what was the point of it?

A. Well, I think he was concerned about the sale of the gallon jug, and as I recall, I believe Mr. Pentz felt that our company would like to meet the gallon jug with a gallon jug. Mr. Wise differed with that, I know, and I believe pointed out one of the other markets where they had had some experience with gallon jugs.

Q. What city was this?

A. I believe it was Washington, D. C.

Q. And what experience, if any, did Mr. Wise describe in Washington, D. C.?

A. I really don't recall, except that their experience apparently had been rather unsatisfactory.

Q. Did Mr. Wise say at any time in your hearing that the gallon jug should be met with half gallons of paper?

A. Yes, I think he felt that way.

Q. I hadn't quite finished my question, sir. I am speaking too slowly, I am afraid — at the same price, in other words, at the same price level as the jugs.

A. I don't recall him ever stating at the same price except that I think that he felt that half gallons of paper should be used to meet the gallon jug competition.

Q. Yes, sir. And did he ever state that not only should be met with two paper half gallon cartons, but it should be met by reducing the price of the paper cartons to whatever level the jugs had been going to?

A. I don't recall him making that statement.

Q. At any meeting anywhere, how many times had you met Mr. Wise?

A. I believe three times in this period of '57 and '58.

Q. Well, on any one of those three occasions, did he ever say anything like that?

A. I don't believe so.

Q. In any language, you understand, I am not confining it just to those words.

A. Yes. I don't recall that he ever made a statement that he would meet gallon jugs with paper half gallons at the same price that the jugs were selling for.

MR. HERNACKI: At this time, Your Honor, the Government would like to attempt to refresh the witness' recollection by reading from Pages 2289 —

THE COURT: 2289 or 2290?

MR. HERNACKI: 2290 and 91, I am sorry, sir.

THE COURT: Read the last question on Page 2290 and the answer to that question as it is continued on page 2291.

MR. HERNACKI: Yes, sir.

Q. Again, Mr. Augenstein, I would like to refresh your recollection by reading a passage of the Grand Jury transcript, testimony given on June 30th, 1959, sir. Would you just listen to what I say and then I will ask you about it. This is the reference to Mr. Wise now.

"QUESTION: Just a substance of what he said where you got this impression that the way to cure it, the only way to cure it"— this being the gallon jug situation — "would be to reduce prices?

"ANSWER: Well, I believe he's made the statement that

the only way to meet the gallon jug price would be to meet it with half gallons of paper, and, of course, that meant reducing the price to whatever level gallon jugs had gone."

Were you asked that question and did you give that answer at that time, sir?

A. Yes, sir.

Q. Does that help you in any respect to recall what Mr. Wise said on the subject of meeting the gallon jug?

A. Well, in order to meet the gallon jug with two half gallons of paper and if gallon jug prices do go down, you have to reduce the half gallons of paper if you are going to meet it with them. And I believe my statement there is simply a verification of that same idea.

Q. Yes, sir. But what I am asking, is, does this remind you as to what Mr. Wise said about meeting the gallon jug?

A. Only that he would meet it with half gallons of paper.

Q. And do you recall, now, anything about what level he was going to meet it at with the half gallons of paper?

A. No, and I don't believe he ever made a statement as to what level he would bring the price of half gallons in relation to the price of gallons.

Q. Now, what was said at the meeting, Mr. Augenstein, about the thirteen percent discount? You mentioned it was discussed. Will you state again exactly what was said about it?

A. Well, we were trying to verify whether the figure that we had been trying to get from the Milgram people was the same figure that they probably had been told by the Milgram people.

Q. Did they tell you what the offer was?

A. No, they did not.

Q. What did Mr. Wise say in response to your inquiry?

A. Well, only that they were aware of the offer and we were confident that they knew about it, there wasn't any question about that.

Q. Did Mr. Wise offer any thought as to what should be done about it?

A. None whatsoever.

Q. Did he at any time suggest in the meeting that the prices may have to go down to eliminate this sort of thing?

A. No, sir.

Q. In any language, again, sir; I am not confining it to those words, you understand that?

A. I don't recall any such inference or statement made by him.

Q. Did you or Mr. Pentz suggest that he come with you to see Mr. Young?

A. I think Mr. Pentz had a luncheon engagement with Mr. Young and I think he invited Mr. Wise to go along.

Q. And did he say to get Mr. Young to withdraw the discount — rather the offer?

A. No, sir.

Q. What is your best recollection as to why he wanted to see Mr. Young, did he express himself at the meeting as to the purpose of seeing Mr. Young?

• • •

A. Would you repeat that question?

Q. I will restate it, sir, simplify it. Did Mr. Pentz state at the meeting the purpose in seeing Mr. Young, which he had in mind?

A. No, he was going to ask Mr. Young if they had made this offer to the Milgram people, because I hadn't been able to find out from the local manager of their company that they had made such an offer. And as Mr. Young was Mr. Phillips' boss, so we were going to ask him.

Q. Now, you say the meeting was in the morning. Did you go and have lunch with Mr. Young?

A. Yes, we did

Q. You and Mr. Pentz?

A. Yes.

Q. And where did you meet?

A. I don't recall, it was the dining room in one of the downtown hotels in Chicago. I don't recall the place.

Q. Was anyone with Mr. Young?

A. Yes, I believe a Mr. Raymond was with him.

Q. And that is the same day?

A. Same day

Q. And will you state, now, what conversation took place, naming as best you can remember who said what?

A. Why, I think Mr. Pentz asked Mr. Young about the discount, whether it had been offered, the amount of it. Mr. Young was very evasive. As far as I recall, he never stated that such an offer had been made.

Q. What else, if anything, was said?

A. That is about all that I can recall of the conversation.

Q. Did Mr. Pentz ask the same question you asked Mr. Phillips, how could he justify so large a discount?

A. I don't recall, but it is possible that he could have asked him the same question.

• • •

Q. I am sorry, did Mr. Pentz say to Mr. Young that that sort of a maneuver in the market could lead to a price reduction?

A. I don't believe so.

Q. Do you recall anything said on this particular point as to what the consequences could be of his continuing this offer?

A. No, because he would never admit that they had made such an offer.

Q. But that didn't convince you that he had made it, did it?

• • •

A. Well, we think highly of the Milgram people, and we think they are honest, they are good buyers. They try to get the lowest price. But I don't believe they would lie to us. So we were pretty well convinced that what they were telling us was correct.

Q. So notwithstanding Mr. Young's statement to you

and to Mr. Pentz, you continued to discuss the discount offer?

A. There was discussion on it along the lines that I have stated. I don't recall anything further.

MR. HERNACKI: At this time, Your Honor, the Government would like to attempt to refresh the witness' recollection by reading from Pages 2287 and 88 of the Grand Jury transcript.

THE COURT: 2286 and 2287?

MR. HERNACKI: I am sorry, yes, 2286 and 2287.

THE COURT: Very well.

Q. Again we will follow the same procedure, Mr. Augenstein, and again this is from the testimony of June 30, 1959:

"QUESTION: (By Mr. Mann) Now, will you tell us the conversation you had with these gentlemen?

Meaning Mr. Young and Mr. Raymond at this luncheon.

"ANSWER: Well, frankly, as I recall, I didn't do much of the talking myself. I think Mr. Pentz talked to Mr. Young about this discount that he had offered to Milgram's, which we had to meet, and as I recall, he tried to inquire what his thinking was and what — how he came about justifying that large a discount.

"QUESTION: Isn't it true that Mr. Young was told that if the discount was not withdrawn that a price war would occur on this market in Kansas City as a result of it?

"ANSWER: I don't recall that exact statement in that manner. It no doubt was mentioned due to the fact that that sort of maneuver in any market, I am sure, with past experience, would bring on a reduction of price. There was only one way to wipe it out, as I see it, when you have that big a discount, and that would be probably to lower the price of milk.

"QUESTION: Weren't you more or less stating the sentiments of Mr. Wise that he felt that that was the way to meet this thing, was to have a price drop? You had already gone to Mr. Wise's office, had you?

"ANSWER: I think that is right.

"QUESTION: So isn't that true, that you were sort of repeating what his sentiments were about it, the way to cure it was to have a price drop?

"ANSWER: The discussion probably had been along that line, and we were probably mentioning that it was not only, perhaps, his thinking, but Mr. Pentz' and my thinking, too."

Were you asked those questions and did you give those answers, Mr. Augenstein, at that time?

A. Yes.

Q. Does that refresh your recollection in any way as the conversation at this time?

A. Yes, and a statement such as that indicates to me that my previous statement that I had made that that large a discount apparently indicated that our prices were too high, our margins were too great to allow.

Q. And isn't that what Mr. Pentz said to Mr. Young?

A. I believe the discussion was along a line where this sort of thing had happened in markets.

Q. Did Mr. Pentz indicate that this was Mr. Wise's thinking, also?

A. I don't recall, frankly.

Q. What is your best memory as to what Mr. Pentz said about Mr. Wise's views?

A. Well, Mr. Wise's views, Mr. Wise never came out with a flat view.

Q. Did Mr. Wise—was he pleased with the knowledge of this discount offer of Hawthorn-Mellody to Milgram's?

A. I frankly don't know.

Q. What did he say about it at the meeting on September 10 in his office when you were there?

A. Very little about the discount.

Q. Did he say he was going to meet it?

A. We asked him that and he said he didn't know what he was going to do.

Q. Did you want to meet it?

A. Frankly, I didn't, personally.

Q. It would have meant a substantial lowering in the income to be received from Milgram's if you had granted it?

A. Yes, it would.

Q. And also on Sealtest part?

A. I am sure it would.

Q. Well, had Mr. Wise in the meeting with you indicated that this could lead to a reduction in prices?

A. No, he did not.

Q. Well, now, did Mr. Pentz say anything at all with regard to Mr. Wise and this discount offer of Hawthorn-Mellody?

A. To Mr. Young?

Q. To Mr. Young.

A. I don't believe so.

Q. Or to Mr. Raymond?

A. Not that I recall.

Q. Now, a drop occurred in the price in milk in Kansas City about September 13, 1957, isn't that right, sir?

A. That is right.

(R. 1027-1029)

Q. Did you, Mr. Augenstein, discuss the drop of price that was coming in the market with anybody else in the dairy business outside your company?

A. I didn't know that there was going to be a drop in price.

Q. Well, did you learn of the drop — you mentioned you had some information. Was this information received before the day which the price decrease was to become effective?

A. I am not sure whether it was September the 12th or September the 13th, but I am sure my record will show which date I got the notification.

Q. And on September 13th, the price dropped, is that correct, sir?

A. Yes, it did.

Q. On September the 12th, Mr. Augenstein, did you discuss the drop in price with anybody else in the dairy business outside your company?

A. Yes, I think I talked to Howard Adams.

Q. And how did you contact him?

A. As I remember, I ran into him in the lobby of the Muehlbach Hotel after a Rotary luncheon.

Q. Didn't you telephone him before that?

A. Not that I recall. It is possible that I could have.

Q. Is it possible that you did telephone him and tell him there was going to be a drop of prices in the market?

A. I don't recall that I did. My only recollection is that I talked to him in the lobby of the Muehlbach Hotel.

Q. Well, would this refresh your recollection, that you told Mr. Adams that the price drop was coming, that it would be of some duration, and that he might want to think about restricting the extent to which the price decrease would be in effect; in other words, the geographical area?

A. Not that I recall.

Q. And that after this information was communicated to him over the telephone, he pressed you for more information and you told him to meet you at the Muehlbach?

A. I don't recall it occurring in that manner whatsoever. My only recollection is — I know I talked to him, I talked to him in the Muehlbach.

Q. Well,—

A. And I am sure that I talked to him about the discount that we had discovered was being offered in the market.

Q. Would you say there was no such telephone conversation before the meeting in the Muehlbach?

A. I am in no position to say, because I frankly don't recall.

Q. Now, when you met Mr. Adams in the Muehlbach, where did you meet him?

A. In the lobby.

Q. And did you have a discussion there?

A. Yes.

• • •

Q. Will you relate the conversation had at that time telling us as best you can who said what?

(R. 1030-1035)

A. I told him about the discount that we had run into in the market. I thought perhaps he might have run into the same thing. I don't recall that he had. At least, he didn't say whether he had or not.

Q. Well, what else did you tell him?

A. I told him about the price drop. At that time, I think it was a one cent a quart and four cents a half gallon.

Q. You told him it was coming?

A. It had already been announced.

Q. Whether announced or not, it wasn't in effect, was it?

A. I think it was in effect that day or the next day.

Q. The next day it was going to be in effect?

A. That's right.

Q. And you told him that was coming the next day?

A. That's right.

Q. All right. What else did you say?

A. Mr. Adams, if I remember right, told me that he was going to drop the price two cents a quart and four cents a half gallon.

Q. For what reason?

A. I do not know.

Q. Did he say that a one cent drop on a quart while four cents on a half gallon wasn't in proportion?

A. I don't recall any statement that he made like that.

Q. What else did you say?

A. I am quite sure that in the discussion concerning the discount that I—we speculated perhaps on maybe this was what caused the drop.

Q. You say you speculated?

A. Yes.

Q. Didn't you tell him that was one of the causes of the drop?

A. I didn't know that, I didn't drop the price, and I sure didn't know why Sealtest had dropped the price.

Q. Well, did you or did you not tell him that that was one of the causes of this price drop that was coming the next day?

A. I think that I speculated that it possibly could be part of the cause.

Q. What did you say sir?

A. That this discount was in the market and that this probably was one of the reasons for the drop.

Q. And you told them who was dropping the price too, did you not?

A. Sure.

Q. Who was it?

A. Sealtest.

Q. Did you mention any other factor as being a cause of the price drop?

A. Not that I recall.

Q. Didn't you mention gallon jugs?

A. I don't recall any reference to gallon jugs at that particular time.

Q. What else do you recall about that conversation?

A. I would say that was about the extent of it.

MR. HERNACKI: At this time, Your Honor, the Government would desire to refresh the witness' recollection by reading from Page 2297 of the transcript.

THE COURT: Is this in further connection with the conversation —

MR. HERNACKI: Yes, sir. Before doing that, may I ask another question?

THE COURT: Yes.

Q. Mr. Augenstein, did you say anything about National taking pictures of low gallon jug prices?

A. Not that I recall, but that was pretty well known, that they had.

Q. Did you say this in connection with it being a reason for the price drop coming?

A. Not that I recall.

MR. HERNACKI: If I may, Your Honor, I would like to read from that portion at this time.

THE COURT: Yes, I think the question and answer there at the top of Page 2297 would be sufficient, Mr. Hernacki, starting with, "Will you tell us what you told him," and the answer to that question, the next question and the answer to that question.

• • •

Q. We will follow the same procedure, Mr. Augenstein.

"QUESTION: Will you tell us what you told him"—meaning Mr. Adams.

"ANSWER: I think I notified him that there was a larger discount being offered in the market, and as far as I could tell that was what brought the price down.

"QUESTION: Did you also mention the fact that gallon jugs—that National had been taking pictures of some of the low prices on gallon jugs, and that that was one of the reasons they had given for dropping the price?

"ANSWER: I believe that is right."

Were you asked those questions, sir, and did you give those answers?

A. If the record shows that, that is exactly what I did, that that is exactly as I remember it.

Q. Does that bring anything back to you, the picture taking of the low gallon jug prices?

A. Yes, I think we knew they were taking pictures of the gallon jug—

Q. Did you mention that to Mr. Adams as one of the reasons for the drop?

A. If the record says I did, then I must have talked to him about that.

(R. 1062-1066)

Q. On June 13, 1958, was there a meeting in Kansas

City at the President Hotel of various dairy representatives?

A. Yes, there was.

Q. Will you tell us, Mr. Augenstein, how you came to get there?

A. Mr. Pentz, my immediate superior, came to Kansas City and asked me to accompany him to a meeting at the President Hotel. Mr. Wise was there and Mr. Edquist and Mr. Callender, and I believe Mr. Stewart and Mr. Gardner. I am not sure that I have named the exact people there, but most of those, I am sure, were there.

Q. Mr. Flanagan, was he there?

A. I don't recall him being there.

Q. Will you state, Mr. Augenstein, what was said at the meeting, telling us who said what?

A. This was a question that was asked me in front of the grand jury and at that time the only recollection of any statement that I could recall was by Mr. Wise indicating that most of us were more interested in profits than we were in a sound market, and Mr. Edquist's immediate reply to that was, I believe, that he was interested in profits, that is why he was in business. Outside of that, I couldn't give you any further statement that I recall being made.

Q. Did Mr. Edquist say he wanted to raise prices in any language?

A. I don't recall that.

Q. Did Mr. Pentz have that point of view?

A. No, but Mr. Pentz wanted me to make a profit in my operation. This I know.

Q. Did Mr. Edquist say that the losses his company was incurring in Kansas City were affecting his profit and loss for the entire company?

A. I don't recall that statement.

Q. Did he in any way say anything suggesting a desire to raise prices?

A. Not that I recall.

Q. Did anybody say anything about raising prices?

A. Not that I recall.

Q. Did anybody say anything about lowering prices?

A. No.

Q. Did Mr. Wise say he thought prices would have to go lower before they went higher?

A. Not that I recall. I only recall the statement that I repeated, that I remembered, after it was suggested to me, I think, by Mr. Jinkinson when he refreshed my me, I think, by Mr. Jinkinson when he refreshed my memory back in my appearance in front of the grand jury and when he did that, I recalled such a statement being made, and I so stated. But even when they asked me originally, I didn't recall that statement.

Q. You say Mr. Wise indicated he was very concerned over getting the market stabilized, words to that effect, sound market?

A. Well, that was his statement, was that the others were more interested in profit than a sound market.

Q. Did he state why the market was not sound, in his judgment?

A. Not that I recall.

Q. Well, what did he say about the conditions in the market?

A. I am sorry that I can't be more specific, but I just don't recall the conversation.

Q. Did he say anything about the gallon jug spread?

A. I don't remember any statement concerning the gallon jug spread.

Q. Did he say anything about the gallon jug, in substance?

A. I imagine gallon jug prices were mentioned.

Q. Is that the best of your recollection?

A. As far as I can recall.

Q. By Mr. Wise?

A. That is correct.

Q. What do you recall, if anything, about what he said about the gallon jugs?

A. Well, gallon jug prices, I am sure, were discussed, because they were rather low, if I remember right, at the time.

Q. At the time most all prices were low, weren't they?

A. Yes, there was considerable amount of what I would call area pricing, where Adams and Sealtest had met the jug stand, and we had to meet our competition and drop our prices in certain areas. Our prices were changed from hour to hour some days on trying to keep up with our competition.

Q. Did Mr. Wise say anything about this area pricing or spot pricing?

A. I can't recall, sir.

Q. Did he say the market wasn't sound?

A. He so indicated in a general statement that I made a moment ago—

Q. Did he say it wasn't the time to raise prices?

A. I don't recall that sort of a statement being made.

Q. Do you recall any sort of a statement on this point?

A. No, I cannot.

Q. Did Mr. Wise say he was going to prepare some price studies of price lists?

A. Not that I know of.

Q. Did he say anything about a discount schedule?

A. Not that I recall.

Q. At this meeting, Mr. Augenstein, was there any discussion of the discount proposal you had?

A. I had none at that time, I am sure.

Q. Is it possible that you had a discount proposal which was discussed at this meeting?

A. No. If there was any discount proposal discussed, it was a discount—it was probably on a dollar basis in some other market.

Q. Now, who brought this up?

A. I am not sure, but it seemed to me that— I had been looking at some other discounts and I know I didn't bring

it up, because if I recall correctly, I don't think I said a thing at this meeting.

(R. 1068-1078)

Q. Did Mr. Wise say either he or his company or anybody in it were going to try to come up with some price lists or price studies or some study of any kind?

A. I do not recall such a statement being made at that June 13th meeting.

Q. In substance, anything like that?

A. I recall nothing along that line at all.

Q. Did he indicate he was going to do anything?

A. That was one thing that usually, when you were with Mr. Wise, he never indicated he was going to do anything.

Q. And how did the meeting end, on what note?

A. I don't know. Frankly, I don't recall.

Q. Nothing came out of the entire meeting?

A. Nothing whatsoever.

Q. Did Mr. Pentz suggest to Mr. Wise you ought to meet the gallon jug with another gallon jug?

A. I think he probably did at that time. I know he had on occasion, I don't know whether it was at that meeting or not.

Q. Mr. Edquist have that view, did he express that view at the meeting?

A. Yes, I think Mr. Edquist felt the same way.

Q. What did Mr. Wise say about it?

A. Well I don't recall what he said, but I am sure he hadn't changed his opinion from the one we had gotten from him before, that he felt like meeting the glass jug with half gallons of paper.

Q. Did he say that wasn't his policy, at this meeting in June '58?

A. I don't recall him making that sort of statement, sir.

• • •

Q. I think we had left off—we were about to begin a discussion of the next meeting you had with Mr. Wise on June 20th of 1958, you do recall that, sir?

A. Yes, sir.

Q. Will you state how you came to go to a meeting with Mr. Wise at that time?

A. I got a call one afternoon from Mr. Stewart. He stated that Mr. Wise was in town, they would like to talk to me and I told Stewart I was [quite] busy at the time, that as soon as I got my work cleared up, I would come down. However, I had an appointment early that evening, I wouldn't be there very long. So it was sometime after 4:30 I went down to the President Hotel and went up to the room where Mr. Wise and Mr. Stewart, I believe Mr. Gardner and Mr. Flanagan were there.

Q. Was Mr. Banfield there?

A. I don't recall.

Q. Do you know Mr. Banfield?

A. Yes, I do.

Q. Who is he?

A. I believe he is the comptroller or accountant for Sealtest.

Q. And will you tell us, Mr. Augenstein, what you said at this time, what Mr. Wise said at this time, what any other said at that time, and also what took place?

A. As I recall, Mr. Wise stated that he thought he had the answer to some of the difficulty in the market. He handed me two sheets of paper which were two wholesale milk price lists. He also handed me another sheet, as I recall, and it had a discount schedule on it. I asked him if I could have a copy, and he stated, no but if I wanted to make a pencil copy, I could, which I proceeded to do.

Q. And when so doing, did you make any observations about the documents you were examining?

A. He asked my opinion, and I made the statement that I thought that the discount looked completely out of line because it was quickly apparent to me that a small customer

would get a maximum discount. I made one query and that was why it was apparent that one list had lower by-product prices, asked why they were lower, and he stated, I believe, to put them in line with the milk prices. That's about the substance of the conversation because I was copying these documents on a piece of paper in longhand and you can't converse very well and do that. I wasn't there over twenty, twenty-five minutes, I suppose.

Q. Did Mr. Wise say anything to you other than what you have just related while you were copying the documents?

A. Nothing else.

Q. The by-product prices that were in existence at that time, had they fluctuated with the milk?

A. Sometimes they did and sometimes they didn't.

Q. Would it be accurate to say that the price war had been primarily on milk and not on the by-products?

A. In that immediate period, that is correct.

Q. Mr. Augenstein, I show you a document marked in evidence as GX Exhibit. 181-A, and ask you to examine that particularly with reference to columns designated 1 and 2, and ask you to state to the best of your recollection, whether the prices there indicated for the products correspond to the prices you found on the documents handed to you by Mr. Wise in this meeting?

A. My recollection is item marked No. 1—there is only two items that I frankly think I remember, and that is the price of half gallon. And in No. 1, you have 25, but as I recall, it was 27. And item 2, 33, that is the figure that I recall.

Q. Now, could you be wrong about the figure 27?

A. I don't think so. My best recollection has always been it was 27.

Q. Well, I will state to you, Mr. Augenstein, that in your Grand Jury testimony, I think one of the latest occasions you were there, you did say 27.

MR. PURCELL: I move to strike that reference to the Grand Jury testimony, Your Honor, I don't understand the purpose of that at all.

MR. HERNACKI: Your Honor, that is a prelude, I am about to ask Your Honor for the opportunity of attempting to refresh the witness' recollection by reference to the transcript Page 1045.

THE COURT: On what page?

MR. HERNACKI: 1045, Your Honor, that would be the first volume, Volume 6.

THE COURT: Would you approach the Bench, please?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: Let me make inquiry, Mr. Hernacki. Mr. Hernacki, I don't think you laid a proper basis of refreshment to make reference to the Grand Jury testimony until you ask him what his initial testimony was—

MR. HERNACKI: I agree, Your Honor.

THE COURT:—on September 16, 1958. And then you may make inquiry as to whether or not he testified in any different fashion, and you can make inquiry as to what happened in intervening time. But I don't think he has, up to this point, testified at all as to what his initial testimony was, and I do not think it proper to invade the secrecy of the Grand Jury Minutes until he has indicated that he does not remember what his testimony was. So I am not going to permit you at this time to utilize the Grand Jury Minutes until he does not recall what his testimony was. If he does not recall, then I will permit you to use it on both occasions, but I think you should give him the opportunity to testify independently of refreshment.

MR. JINKINSON: I think Your Honor is right.

THE COURT: Very well.

(WHEREUPON, THE FOLLOWING PROCEEDINGS

WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. Mr. Augenstein, is it your recollection that the No. 1 price list, the lower price list, was at a price lower than the existing price on the market at that time?

A. It was lower than the existing price list, but as I recall, it was somewhere close to what some of the area pricing was.

Q. In other words, the spot pricing or area pricing?

A. That is correct.

Q. I ask you, Mr. Augenstein, if the list shown you contained the figure for the half gallon homogenized white milk of 25 or 23 cents?

A. My recollection is 27.

Q. Do you remember, Mr. Augenstein, what you testified to the very first time you appeared before the grand jury on the date of September 16, 1958, a few months after this event?

A. No, I do not.

Q. Could you have then stated 25 or 23 cents?

A. I wouldn't recall what I had stated at that time.

MR. HERNACKI: At this time, Your Honor, the Government renews its request to have an opportunity to refresh the witness' recollection.

THE COURT: Yes. Now, let me make certain which—you may refresh the witness' recollection as to his testimony on September 16, as it appears in the center of the page on Page 1045.

MR. HERNACKI: Very well, Your Honor.

Q. We will follow the same procedure, sir.

"QUESTION: (By Mr. Mann)"—and this is in relation to the meeting of June 20, 1958, at Mr. Wise's room at the Hotel President—"There were two price lists, as I understand it. You say the price at that time, the going price on the market, was 27 cents a half gallon?

"ANSWER: I believe that was right.

"QUESTION: One price list they showed you would be lower?

"ANSWER: That is right.

"QUESTION: The price would have been 25 or 23 cents a half gallon; do you remember what it was?

"ANSWER: 24 or 25. I am not sure which it was.

"QUESTION: And the other one was the price increase from the 27 up to 33 cents?

"ANSWER: Yes."

Were you asked those questions and did you give those answers, sir?

A. Yes.

Q. Does that refresh your recollection as to the price on the lower of the two price lists at that time?

A. I think I answered, because I believe our list price at that time was 33 cents. I believe my statement there was that our price was 27; I think we were 33. Our records will bear that out. So that at that time I believe area pricing was anywhere from 23 to 27, or 25 to 27.

Q. And what is now your best present recollection as to the price on the lower of the two lists shown you?

A. I still have to stand on the 27, because that is my best recollection.

Q. Would you again re-examine GX-181-A, Mr. Augenstein, and state whether or not the present prices shown in the first column reflect accurately the prices then in existence as of June 20?

A. The only one that I could pick out quickly, to be sure of, is half gallons at 33, and I believe at that time that was our price, our list price.

Q. And the prices in the No. 1 column for the by-products are substantially lower than those under the present column?

A. Yes, they are.

(R. 1081-1083)

Q. Before proceeding further with that, let me again

revert to the June 20 meeting, after you had copied the price lists. What, if anything, did Mr. Wise or any of the other Sealtest people say with regard to those price lists and discount schedules?

A. The only other remark that I remember, they stated that Mr. Callender was going to be there.

Q. And would be shown the same documents?

A. I assume so.

Q. Do you recall anything else, any other conversation between you and the Sealtest people at that meeting?

A. No, I do not.

Q. Did any one of the Sealtest people there tell you they thought this is what ought to be done to straighten the market up?

A. Not in that manner. I think I mentioned when I got into this meeting originally, Mr. Wise had stated that he thought he had—they might have the answer to some of the difficulty in the market. Outside of that, there was no other reference to that.

Q. Well, did they go a little further and say that is what ought to be done to straighten the market up?

* * *

A. No, he said nothing along that line.

MR. HERNACKI: At this time, Your Honor, the Government requests the opportunity to refresh the witness' recollection by reading from Pages 1045 and 1046 of the transcript.

THE COURT: You may do so. That is beginning at the bottom of Page 1045, Mr. Hernacki?

MR. HERNACKI: I believe I am in error, Your Honor, just the top of 1046, the question and the answer, or if you prefer, from the bottom of 1045.

THE COURT: Yes.

Q. Mr. Augenstein, I will read the portion to you:

"QUESTION: Did they explain why they were showing you two price lists; what was the object of showing you two price lists; did they explain that to you?

"ANSWER: Not in detail. I believe that they said that they thought that that is what ought to be done to straighten the market up."

Now, were you asked that question and did you give that answer, sir?

A. If I stated that at that time, that is exactly as I recall it.

Q. And would you say that is what they did say to you at that meeting?

A. Yes.

(R. 1095-1100)

Q. Mr. Augenstein, at any time in about July of 1958, did you have a conversation with Mr. Adams about two-for-ones?

A. Yes. I think I did.

Q. And will you state when and where that conversation took place?

A. I believe in his office.

Q. You went to see him?

A. Yes, sir.

• • •

Q. And can you place it any time within that month?

A. I can't recall the date, but I do recall being in Mr. Adams' office.

Q. Would it have been after the drop in prices on July 14th and also the by-product drop on July 21st?

A. I do not recall.

Q. All right. Will you state who, if anyone else was present besides Mr. Adams?

A. I think Howard Adams was the only one present besides myself.

Q. Can you tell us, now, what the conversation was between yourself and Mr. Adams on this occasion?

A. I believe we discussed, if I remember correctly, the engineers' contract, operating engineers' union contract, and I believe I made the remark to him that I had heard

that in the market, if there was any more two-for-ones, that it might go for the entire market. As I recall, he said Sealtest. This, I never said, I am sure.

Q. I am sorry, you lost me there on that last part.

A. Well, I think he referred to Sealtest being the one that was going to do this.

Q. You say he referred to Sealtest?

A. I am sure that's correct.

Q. And what did you say?

A. I did not know who it was going to be. This was only a rumor.

Q. A rumor?

A. That's right.

Q. You don't remember who told you that?

A. No.

Q. Don't you remember, Mr. Augenstein, that you heard that from Mr. Stewart?

A. I don't recall.

Q. Do you recall at any time that Mr. Stewart, just prior to this conversation with Mr. Adams, at any time in that general period prior to that conversation, Mr. Stewart telling you that he was going to drop the price all over the city at one time if they were going to have any more two-for-ones?

A. I am sorry, but I can't recall that conversation.

Q. In other words, a reference by Mr. Stewart that there is any two-for-ones for store openings, that was the Adams habit, is that not correct?

A. That is correct.

Q. If there are any more two-for-ones on store openings there would be a city-wide two-for-one, do you recall any statement to that effect in any language by Mr. Stewart?

A. Not that I recall.

MR. HERNACKI: At this time, Your Honor, I renew my request to read that particular material.

THE COURT: You may begin at the third question

from the bottom of Page 1096, and continue down to the question, the third from the bottom on 1098, which commenced, "In other words, you."

MR. PURCELL: Before that is done, Your Honor, and for the record, defendants and each of them object to the testimony concerning the matter under inquiry and to the refreshment of the witness' recollection concerning same, for the reason that the matter now being inquired about is not particularized or alleged in the indictment. We believe it is immaterial to any issue in the case, has no probative value.

THE COURT: Objection overruled. You may proceed.

MR. HERNACKI: Thank you, Your Honor.

Q. Again, the same procedure, Mr. Augenstein.

"QUESTION: Who was there other than you"—this is a reference to the discussion between yourself and Mr. Adams in his office.

"ANSWER: Howard Adams.

"QUESTION: Just the two of you?

"ANSWER: That is right.

"QUESTION: Didn't you tell him that you had been talking to Sealtest about the pricing situation in Kansas City?

"ANSWER: No, I told him that I had heard that if there was any more two-for-ones that the entire market was probably going to have a two-for-one at that same time and I told him that my only interest in it was that if that situation existed, I would become involved in it and it was not my liking at all.

"QUESTION: You said you had heard that. Now, where did you hear that, from whom?

"ANSWER: I don't know whether it was Mr.— I believe it was Mr. David Stewart who made that remark.

"QUESTION: Did he say that he was going to drop the price all over the city at one time instead of having spot areas?

"ANSWER: The remark, as I recall, was that if any

store, the opening of a new store, had a two-for-one, there would be a two-for-one sale in every store in the city at the same period of time."

Were you asked those questions and did you give those answers, sir?

A. That is correct.

Q. Do you recall Mr. Stewart making the remark about the two-for-one city-wide?

A. Apparently my recollection at that time was in that manner.

FRANK GARDNER
Sealtest—Assistant to Raymond Wise

(R. 1220-1223)

MR. HERNACKI: The Government calls Frank Gardner.

THE COURT: Counsel, approach the bench while Mr. Gardner is coming, please.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

THE COURT: In accordance with our practice on the Grand Jury notes, the Government has handed me a memoranda of some nine points. In regard to point No. 3, may I suggest to the Government that there are two subjects intertwined in that question, and unless both are covered at the same time, I think you should break the testimony apart.

In regard to point 7, and because of testimony that appears on Page 1693, I do not think that the testimony designated for refreshment is sufficiently precise, or at least there is a possibility of that. Let me give you a recap on point 7 depending on the way the testimony develops.

In regard to point 8, I will not permit refreshment on point 8, because it is apparent from other portions of the Grand Jury testimony that this witness was not present and he obviously was talking about what someone else has

told him. So I will not permit refreshment on point 8.

Other than those points that I have mentioned, the Government may be permitted to refresh the recollection as I have indicated.

MR. CHADWELL: Your Honor, I assume that we have the same motion that we have before?

THE COURT: Yes, you have both the objection and the motion standing throughout this record as to the utilization of the Grand Jury testimony.

MR. CHADWELL: As particularly it is difficult for us to follow these efforts to refresh the witness' recollection when we are unable to see what he did testify to before the Grand Jury. I know Your Honor is watching the actual reading of the parts that you permit Government counsel to inquire about, but—

THE COURT: In addition to that, I am reviewing the entire subject matter under examination to go with the particular portions that the Government seeks to use, and I am ruling prior to the examination of the witness or at least the utilization of the Grand Jury record exactly what has been stated there and exercising a juridical judgment as to whether or not there is data present from which it may be reasonably said that recollection can be refreshed or whether, in my judgment, such evidence is not present and as in connection with this particular witness.

I have ruled that it is my judgment that in connection with a particular point, I do not agree with the judgment of the Government that particular Grand Jury testimony would be calculated to refresh the witness' recollection on that particular point.

MR. CHADWELL: I understand, Your Honor, but at the same time, I am sure you understand our position, that for us to make our own evaluation to better prepare for cross-examination, it is difficult. In fact, impossible to do so without access to those portions of the transcript to which Your Honor has referred.

THE COURT: I understand that and the record so shows.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

(R. 1232)

Q. On June 13, 1958, Mr. Gardner. did you attend a meeting here in Kansas City at Mr. Wise's room at the President Hotel where other dairies' representatives were present?

A. I attended a meeting, yes, but I don't know about the date.

(R. 1234-1240)

Q. Who was responsible for that meeting?

A. I believe it was called at Mr. Pentz's request.

• • •

Q. Incidentally, was Mr. Banfield present at this meeting?

A. I don't recall that he was.

Q. Now, will you state to the jury, Mr. Gardner, what happened during this meeting, what was said and by whom, as best you recall?

A. Well, I believe it was just sort of a rehash of the problems that existed due to spot pricing, coupons, gallon jugs, weekend specials, the disrupted milk market. I believe this is the meeting when Mr. Edquist also thought—no, I believe that it was Mr. Augenstein, that the jugs was only two or three percent of the volume and didn't amount to anything. Mr. Stewart thought it was somewhere around eight to ten percent of the market, because we were steadily losing business, and I believe it was at this meeting that someone brought up that the Milgram chain was getting a long discount—I believe it was Mr. Edquist, brought up that the Milgram Company was getting a long discount

from the Borden Company and Mr. Pentz said, "Well, if we get two or three customers that give a special discount, too, that is the dairy business." And Mr. Edquist said, "Well, you can never have a stable market under those conditions." And I believe that Mr. Wise agreed with him. I know this, we were losing business steadily, our volume was going down badly. Spot prices were breaking out like the small pox and we were very much concerned about our business and we—well, we were just concerned about the business, that is all.

Q. Was that the entire meeting?

A. As far as I can recall now, yes, sir.

Q. The discussion about the Milgram Company, did Mr. Pentz say that that was a matter between Borden, Sealtest and because the two of you had that business alone, you would get that price up between you?

A. Well, no. As I recall, we were both serving them and Mr. Edquist said because of the—apparently because of the long discounts, the Milgram Company could put on a week-end special and disrupt the retail business, especially. And Mr. Pentz said, "Well, that's Sealtest and ourselves serving it, so if we want to give them a long discount, that is our business," or words to that effect.

Q. Did he also state that if we wanted to cut it out, we could do it, too; words to that effect?

A. No.

Q. Was a discount schedule, a proposal, shown by Mr. Augenstein?

A. Not that I recall, no, sir.

Q. What do you recall about any discount schedule?

MR. CHADWELL: You mean at that meeting?

• • •

Q. So we are clear, Mr. Gardner, all my questions are confined to this meeting at this time and what was said at the meeting.

A. At the June 13th meeting?

Q. Yes, sir.

A. There was no discount schedule, to my recollection, at all.

Q. Or a proposed rebate schedule?

A. No.

Q. Do you refer to a rebate schedule or discount by any other term?

A. No.

Q. Do you know what I am talking about?

A. Yes.

Q. Was one discussed at this meeting?

A. I don't recall it being discussed at that meeting, no.

Q. Did Mr. Stewart get ahold of a copy of a proposal from Borden which was talked about at this meeting?

A. I don't recall it, no, sir.

MR. HERNACKI: At this point, Your Honor, the Government desires to attempt to refresh the recollection of the witness by reading from Page 1678 of the Grand Jury transcript.

THE COURT: You may do so, commencing with the first question on that page, including the last answer.

Q. Mr. Gardner, you appeared before the Federal Grand Jury here in Kansas City on or about October 21st, 1958, do you recall that, sir?

A. I recall appearing, yes, sir.

Q. About four months or five months or so, right after the July meeting—or June meeting, rather?

A. Yes, sir.

MR. CHADWELL: May I inquire whether this was the first or second appearance of Mr. Gardner before the Grand Jury?

MR. HERNACKI: The second appearance.

MR. CHADWELL: Thank you.

Q. At this time, Mr. Gardner, I will read a portion of the testimony then given and I will ask you some questions about it, so would you just listen, please?

"QUESTION: Will you relate for us as best you can, and reconstruct it as best you can, the meeting, what was

said by the various persons who were there"—meaning this meeting in June.

"ANSWER: That meeting was called by—at the request of Mr. Pentz. Mr. Pentz had been after Mr. Wise to have a meeting. Mr. Wise did not want to have a meeting, but said the next time he was in Kansas City, he would let the local people know."

MR. HERNACKI: I am sorry, Your Honor, did I begin at the right point? I wasn't sure.

THE COURT: No, you can go clear down to the last answer on that whole page.

Q. "QUESTION: How did you find that out?

"ANSWER: Just from general conversation.

"QUESTION: Did Mr. Wise tell you that?

"ANSWER: Yes, I think he did, yes, sir. And at that—prior to that time, Mr. Stewart had gotten a copy of the proposed rebate schedule that Borden had been considering, and there was a general discussion on that, and at that time, I believe, Mr. Augenstein, said that that would not apply to the customer who we served mutually, which is the Milgram Company, that they would continue on the same basis. And Mr. Augenstein said, 'Well, if you are going to have special deals for special customers'—not Mr. Augenstein, Mr. Edquist, said, 'If you are going to have special deals for special customers, the whole thing will fall flat.'" Were you asked those questions and did you give those answers, sir?

A. Well, sir, if that—

MR. CHADWELL: Your Honor, I sumbit that a large part of that is quite the same as he said this time and I don't quite see the purpose of refreshing the witness' recollection. The only difference I see—

THE COURT: I think that is true, Mr. Chadwell. I wanted the witness to have the benefit—you are quite right, there is much of it that is consistent, and I will explain to the witness that the purpose of reading these questions and these answers is to aid you in refreshing your present recol-

lection concerning what happened at the June 13th, 1958, meeting. Counsel is about to ask you and I will ask you, do you recall those questions having been asked you and your giving these answers?

THE WITNESS: Well, sir, that was my testimony at the Grand Jury hearing. I am sure my memory was better then than it is now, five years later.

THE COURT: Well, let me ask you if having had these questions read you in context, and as Mr. Chadwell points out, confirming some of your earlier testimony, does this aid your present recollection as to what was said there so that you can better answer the question—

THE WITNESS: I think, sir, that I have answered it the same as my testimony there, except with reference to the Borden refund schedule or whatever it was that Mr. Stewart had.

THE COURT: Now, having heard the questions and answers concerning the Borden refund, does—or rebate, does this refresh your recollection at the present time?

THE WITNESS: No, sir, I really can't say that I can remember it, but it must have happened, because that was my testimony, and I did the very best I could there, as I am right now.

THE COURT: Very well.

(R. 1242-1245)

Q. Now, with everybody feeling that prices should go up, what did Mr. Wise say about going up at that time?

A. I don't recall any remark he made, sir.

Q. Well, he said something on the subject, did he not?

A. He may have, yes, although I don't recall it.

Q. It wasn't just a case of Mr. Edquist and Pentz and Callender saying that they thought this should be done and he not saying a word about it?

A. Well, I am sure that he agreed with them, and it should be done on some sort of a practical manner, because the market was a very—

Q. And what was the practical manner—excuse me.

A. —the market was in a very unstable condition. Lots of our customers were off list pricing. There was spot pricing, weekend specials, coupons all over the market by the major dairy and gallon jugs.

Q. And what was the practical basis on which Mr. Wise would like to handle the matter?

A. I can't speak for Mr. Wise, but—

Q. Well, I am asking you what he said at the meeting.

A. As I recall, he said that we were going to make a definite study of our condition and find out just what the prices were that we were getting for our milk.

Q. What else was he going to do?

A. I don't know.

Q. Did he say anything about some prices?

A. That were in effect or what?

Q. In any way; what did he say about prices?

A. I don't recall him saying anything definitely about prices, any more than everyone was suffering and just a general crying-towel session.

Q. What was Mr. Wise's purpose in making a study of the prices which Sealtest was then getting on the market?

A. I would say it was because their prices varied so much. We had prices, as I recall, as low as 23, 24¢ a half gallon—

Q. Yes, sir,—

A. —to meet certain conditions in certain areas. And from there on up to whatever the list price was at that time.

Q. So after those studies were made and it was determined exactly what you are getting for the product in the spot areas, what about it, what was going to happen then?

A. Well, I presume that we would arrive, for our own customers, a price list of our own and put it out, which it probably raised some customers prices and lowered others, I don't know.

Q. You mean put it down, didn't you?

A. Beg pardon?

Q. You mean put it down?

A. No, put the price list out to our customers and start out on a certain date.

Q. But the price lists were higher than the spot prices you were getting?

A. What price list?

Q. The list prices were higher than the spot prices in the market?

A. Oh, yes.

Q. And you were making a study of the spot prices to determine what price you should have on a new price list?

A. That's right, sir.

Q. So it would be a lowering of the list prices, wouldn't it?

A. Well, it would probably be someplace—it would be an average, I would say, of about what we were getting and I think maybe a little higher.

(R. 1248-1252)

Q. Mr. Gardner, we were discussing the study which Mr. Wise said he was going to have made. Do you recall him saying that he was going to come up with a price list which would reflect the average price of milk which you were then getting?

A. No, sir, I don't recall him saying that.

Q. And did he say he would come up with another list, a higher list, reflecting the prices that would be where you were earlier in the year?

A. No, sir, I do not remember him saying anything like that.

MR. HERNACKI: At this time, Your Honor, the Government would desire to attempt to refresh the witness' recollection by reading from Pages 1682 and 83 of his testimony before the grand jury.

Or perhaps may I suggest the first question at the bottom of Page 1681 as a better starting point?

THE COURT: Yes, I don't think we need that part on

1681, Mr. Hernacki. Start with the question as it appears on 1682.

MR. HERNACKI: Yes, Your Honor.

THE COURT: The first question on that page after the preceding long answer.

MR. HERNACKI: Very well, Your Honor.

Q. Again we will follow the same practice, Mr. Gardner. I will read and then ask you some questions. This again is from the testimony given on October 21, 1958, sir:

"QUESTION: Is this the June 11 meeting where he stated that you were going to consider making up a price list which would lower the prices on the market to more or less the spot level, the spot price level, and—

"ANSWER: (Interrupting.) It may have been that meeting, it probably was.

"QUESTION: And also another price list which would go into effect later on with higher prices in them?

"ANSWER: Well, another price list to see where we had to go in order to be where we were earlier in the year."

I think I had best continue with that, Your Honor.

THE COURT: I think so, so the witness can get it fully.

Q. (Reading:) "QUESTION: To bring the market up to a more normal level?

"ANSWER: Yes.

"QUESTION: So wasn't it his proposal that this market be put in a firm or a stable condition by a two-step process, first you lower your prices in the market in order to get down to the bottom, get down to that low level of spot prices, and then, if the market would steady at that low price for a certain period of time, then you would have more or less of a foundation, which would be sound and you could take your second step up to a price which had been prevalent—

"ANSWER: (Interrupting.) I don't think he stated it just such as that. He said the local people were going to make a survey, a projection, and a study on what our average pricing was then and what—a projection on a

price, and I think it was 37 cents the same price that prevailed some time in the past.

"QUESTION: That is the June 11 meeting, is that the way the meeting ended, with him saying he would make that study, his company would have that study made?

"ANSWER: Oh, I don't know whether it ended right at that particular time or not, no.

"QUESTION: At least he made that statement—

"ANSWER: (Interrupting) The statement was made to that effect, and I presume he is the one that made it."

Were you asked those questions, sir, and did you give those answers at that time?

A. Well, if that is what the transcript says, I must have.

Q. Does it refresh your recollection with respect to whether or not Mr. Wise said that he or the Sealtest people here would come up with a price list reflecting the more or less area prices and also a second price list at a higher level?

MR. CHADWELL: I object, Your Honor, that is not what the transcript indicates.

THE COURT: Sustain the objection as to the form. I think the word, "study," was used, Mr. Hernacki.

Let me ask you, after having heard the questions and answers read you, Mr. Gardner, what is your recollection in regard to the conversation that took place at the June 13, I think it has been established as the date, rather than June 1, 1958, meeting?

THE WITNESS: Well, Your Honor, as I said a while ago, I remember, I am positive we said that the local people would make a study, a survey of what prices we were getting from our customers at that time, and we would make some projections, based on the results of that survey.

THE COURT: Go ahead.

THE WITNESS: And try to create a stable market.

THE COURT: You may inquire further, counsel.

Q. And how was that market to be made stable?

A. Well, so we wouldn't have these wide variations, so

all our customers would be buying somewhere near the same price.

(R. 1273-1278)

Q. On July 14, Mr. Gardner, were you present at another meeting between Mr. Wise and representatives of other dairy companies?

A. Where was this?

Q. In Chicago, Illinois, Mr. Wise's office, sir.

A. Was that Mr. Pentz and Mr. Edquist?

Q. Yes, sir.

A. I was there part of the time, yes.

Q. And just the four of you?

A. I believe so.

Q. When you walked into the room on that day, what was going on?

A. Well, Mr.—was that the day when—

Q. There was a price—

A. —when Foremost dropped the price?

Q. Correct, sir.

A. Fairmont or somebody dropped the price.

Q. Yes.

A. Yes, Fairmont. We didn't know anything about it until Mr. Stewart called that morning, and Mr. Edquist apparently didn't know anything about it. Mr. Pentz didn't know anything about it.

Q. When you walked into the room, Mr. Gardner, what was going on?

A. Gosh, I don't recall definitely what was going on, sir.

Q. What was the conversation that took place that you did hear?

A. I do remember Mr. Edquist saying, words to the effect that if Fairmont dropped the prices, it was because they were losing so much retail business that they were trying to protect their home service, volume.

Q. Who was he saying that to?

A. Probably to Mr. Wise and Mr. Pentz.

Q. Did you, Mr. Gardner, say anything at that meeting?

A. I probably did, but I don't recall what I said.

Q. What did Mr. Wise say?

A. I believe there was further discussion about the various methods of meeting the gallon jug competition.

Q. I repeat, what did Mr. Wise say?

A. That he still believe we should meet it with conventional containers.

Q. At what price?

A. At a price where we would not continue to lose volume.

Q. What price?

A. I don't know what the price, but there is area over and above the jug price, where we felt we couldn't continue to lose volume.

Q. Certain spread?

A. Yes, maybe three or four cents a gallon, something like that.

Q. Could it have been five cents?

A. Well, you get it too high and you continue to lose volume especially when these housewives know that all milk is good milk.

Q. Well, who, Mr. Gardner, was the first one to say that the price was down in Kansas City?

A. I think I got the message from Mr. Stewart.

Q. Yes, sir.

A. And I think I am the one who told the rest of them.

Q. You are the one who told the rest of them?

A. I believe so.

Q. This was news to all of them?

A. It apparently was. Apparently Mr. Edquist didn't even know it.

Q. And you are the one who told them?

A. Yes, sir—I believe so.

Q. Could it have been, Mr. Gardner, that it was Mr.

Edquist who was telling the others when you walked into the room on that day?

A. No. I am sure I got a call from Mr. Stewart that morning.

Q. Regardless of whether you got the call from Mr. Stewart, could it have been when you walked in the room the first time that day Mr. Edquist was telling the others about the drop in price by Fairmont in Kansas City and the reasons for it?

A. No, sir, I don't recall that, no. I believe I am the one who got the news.

MR. HERNACKI: At this time, Your Honor, the Government desires the opportunity of attempting to refresh the recollection of this witness by reading from Page 1699 of the transcript starting with the bottom first paragraph.

THE COURT: Did you propose to read any more than that portion—

MR. HERNACKI: I think just the first complete answer on Page 1700.

THE COURT: That will be permitted.

Q. Well, following the same procedure, Mr. Gardner, reading from your testimony, that is, October 21, 1958, you are giving as part of an answer where you are changing from one subject to another:

"ANSWER: In the interim period there, oh, when we were in Chicago—it was the day that Fairmont dropped the prices—and when Mr. Oliver came in—not Mr. Oliver, Mr. Pentz came in, I wasn't in Mr. Wise's office when he first came in there, but when he came in and found out the prices had dropped, it was the first time he had known that they had dropped about five or six cents a half gallon, that day by the Fairmont people, which is Country Club, I think, and Mr. Pentz's explanation of it was that they were losing so much retail business, due to these low cost spot pricings and—

"QUESTION: (Interrupting.) Pentz? Pentz is with Borden.

"ANSWER: Not Pentz, Edquist. Because of the low spot pricing, off list pricing, low-cost gallon jugs and coupons and so on, that they decided they had to do something to protect their retail business, so they put a lower price into effect, both retail and wholesale.

Now, were you asked those questions and did you give those answers, sir?

MR. CHADWELL: If Your Honor please, I protest that this is not proper refreshment. I don't think there is anything in there that is inconsistent with the witness' testimony at all.

THE COURT: Objection overruled. You may answer as to whether that refreshes your recollection—

MR. CHADWELL: I object to the question, Your Honor.

THE COURT: —as to who found out, by what means, Mr. Pentz found out.

A. No—if that is what I testified to before the grand jury, my memory was much closer to the events because it was closer to the events at that time, and if that is what I testified to at the grand jury, I am sure that is what happened because I testified to the best of my ability and recollection.

Q. Is it possible then that when you walked in, Mr. Edquist was telling the people about the drop?

A. Very possible.

JOHN W. BAIRD
Sealtest Milk Sales Manager

(R. 5392-5393)

CROSS-EXAMINATION

BY MR. JINKINSON:

• • •

Q. Now, Mr. Baird, you appeared before a Grand Jury,

didn't you, investigating the milk conditions in Kansas City, Missouri?

A. Yes, sir.

Q. And I hand you Defendants' Exhibit 142-X and Y.

• • •

Q. (By Mr. Jinkinson) You testified before the Grand Jury prior to the time you wrote those documents, did you not?

A. I am not real certain when I did appear before the Grand Jury. I was subpoenaed twice and only appeared once, and the exact date, I couldn't tell you.

Q. You can't tell whether or not you appeared prior to —before the Grand Jury prior to the time you wrote Defendants' Exhibit 142-X and 142-Y?

A. I couldn't answer that as to whether I had or had not, sir.

MR. CHADWELL: Mr. Jinkinson, if you will tell me the date when he appeared before the Grand Jury, I will be very glad to stipulate to it.

MR. JINKINSON: I think it was September, 1958.

MR. CHADWELL: Well, as soon as you are sure about it, we will check the date and we will have no problem as to the stipulation as to when Mr. Baird appeared before the Grand Jury, if he doesn't remember.

(R. 5518-5521)

Q. Now, have you always been of the opinion that these jug operations in the Kansas City area were detrimental to your business?

A. Yes, sir, we kept losing retail business to them.

Q. And you were firmly convinced of that in December of 1958?

MR. CHADWELL: Objection, immaterial as to December, 1958. This map goes up to June and December is beyond the indictment period and it is outside the scope of the direct examination. If he wants to inquire about June, 1958—

Q. (By Mr. Jinkinson) Were you firmly convinced in

July of 1948 that these jug operators were detrimental to your busines?

A. Yes, sir.

Q. Mr. Baird, do you recall testifying before a Grand Jury in this matter?

A. I appeared before the Grand Jury, yes, sir.

Q. Do you recall testifying on or about the 4th day of December, 1958?

A. I don't remember the exact date.

• • •

Q. Yes. Well, do you recall that you were asked this question and you gave this answer—

MR. CHADWELL: Well, now, I object to that. First, I think we should have it clear in the record, of course, so it would show when Mr. Baird appeared before the Grand Jury and I would like to have Mr. Jinkinson state that.

MR. JINKINSON: He appeared on December 4th, 1958.

• • •

THE COURT: The record will also show that the same procedure was followed in connection with this witness and your same objection will show of record and that the Court has reviewed his testimony prior to examination.

Q. (By Mr. Jinkinson) Do you recall being asked this question and having given this answer.

MR. CHADWELL: May it please the Court, may we approach the Bench?

THE COURT: Yes.

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. CHADWELL: May I inquire of the Court whether Mr. Jinkinson has shown to the Court the transcript of the Grand Jury testimony?

THE COURT: Yes. Yes, the same memoranda has been submitted to the Court in connection with testimony given by Witness Baird on December 4th and December 5th with

the sections marked for the testimony covers the entire subject and the particular questions that Mr. Jinkinson wishes to inquire about, which appear on Page 1930. The witness' prior testimony as to his attitude toward the gallon jug situation in July, '58, is directly within the scope of the examination that has been shown to the Court, and the Grand Jury testimony relating to that question, I take it, Mr. Jinkinson, is what you wish to refresh his recollection?

MR. JINKINSON: Refresh his memory on, that is all. If it doesn't, that is the end of it.

MR. CHADWELL: Well, I wish to make the same motion that I have heretofore, Your Honor, the same objection that I have heretofore; namely, that I think we should be permitted the opportunity of seeing these sections of the transcript which Mr. Jinkinson is going to inquire about and also those relating to it so that we can decide whether we should redirect the witness on these questions.

THE COURT: That's right, and I intend for the record to so show on the statement I made before we were here, but I guess this has been spelled out completely at this conference and the same ruling will be made.

(R. 5523-5524)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD IN THE PRESENCE AND HEARING OF THE JURY:)

Q. (By Mr. Jinkinson) Well, Mr. Baird, do you recall having been asked this question and having given this answer: "Question, what did you tell Mr. Flanagan or what was your conversation with him with regard to the gallon jug operators? Answer: I think the gallon jug operators were just a small factor right at that time, as I—I mean I am trying to remember?"

A. At what time was this being discussed? I don't recall that answer, no, sir, in answer to your question, trying to place this.

Q. Does that refresh your memory?

A. No, sir, I don't recall that question at all.

Q. Is it a fact, Mr. Baird—

MR. CHADWELL: Does that conclude your reading?

MR. JINKINSON: That concludes it.

MR. CHADWELL: Well, if Your Honor please, I don't think that is in any way contradictory to this witness' testimony, and I move to strike the question and answer.

THE COURT: Well, the witness has testified that this does not refresh his recollection as to the conversation and his description of his view of the jug operators on July 1, 1958.

MR. CHADWELL: I don't see how it could. He talks about "at that time." There is no showing what it is about and I object to it. Move to strike it.

THE COURT: You say you move to strike it?

MR. CHADWELL: Yes.

THE COURT: The motion will be overruled.

(R. 5590-5591)

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

MR. CHADWELL: I don't want to press unduly the motion I made this morning with respect to Mr. Baird's Grand Jury transcript, but after the reading of the question and answer by Mr. Jinkinson and the response by the witness, I renew my motion for leave to read the remainder of the testimony of the witness on this subject only. I am limiting it to this subject, because I have no desire to press into the general testimony of this witness except insofar as his other testimony relates to the subject matter of the question and answer read to him by Mr. Jinkinson. I renew the motion before this witness leaves the stand so that if I deem it desirable, I will have the opportunity to—or Mr. McLaren, in directing the witness, will have the opportunity to ask him some further questions on the subject.

MR. JINKINSON: I, of course, just used it to refresh the witness' memory. He said it didn't refresh it, that was the end of it.

MR. CHADWELL: Well, the jury, of course, heard the question and answer and they draw certain adverse conclusions, perhaps, which they aren't warranted in drawing on the basis of refreshment of recollection, but which nevertheless is a dangerous probability and that is the reason I make my motion.

THE COURT: I will overrule the motion, because I think basically the same situation is presented here as presented throughout.

DAVID W. STEWART
Sealtest General Manager

(CROSS-EXAMINATION)

(R. 6347)

Q. (By Mr. Hernacki) Now, with regard to June of 1958, there was a meeting held in Kansas City on June 13, 1958, at the President Hotel, and you have testified about that earlier?

A. June what?

Q. 13th.

A. Yes.

(R. 6353-6358)

Q. Prior to the time of this meeting, hadn't you received from Mr. Augenstein a new proposed discount schedule or a draft of one?

A. I can't be sure. I don't think so, but I am not sure. I don't believe that I saw—I know I didn't see the actual discount schedule that they put in on July 1. I am just reasonably sure I had never seen it before, because it was rather shocking. I know I testified at the Grand Jury that I thought I had seen one somewhere, but I don't believe I saw one prior to June 30 when they put that thing out. It just didn't fit.

Q. You say you testified before the Grand Jury that you had seen it before June 20?

A. If I remember right, I testified to something like that.

Q. And that testimony was given in 1958?

A. Yes.

Q. Well, is your memory a little different from the rest of us, Mr. Stewart, does it improve with age?

A. Well, certainly a lot of important things in my life, and things pertaining to the business, I think you remember a lot of things. I think it has been said many, many times that those things that aren't of interest, you can forget. You can certainly remember the things that are more of interest and important.

Q. Well, how is it that you could remember in 1958 that you had that discount schedule or a draft of a discount schedule before the meeting, and now you say you didn't have it until after that meeting?

A. If I testified to that in front of the Grand Jury, and I am not sure, and I said that, if I did—there is—I can't answer, I mean if you have the proof there, bring it out.

MR. HERNACKI: At this time, Your Honor, the Government requests the opportunity of attempting to refresh the witness' recollection by reading from Page 1596—

THE COURT: Yes. Do counsel want the same record made on this, and it is the same record?

MR. PURCELL: Your Honor, we didn't know there had been any markings until just now.

MR. CHADWELL: Any what?

MR. PURCELL: Any markings.

MR. CHADWELL: Nothing has been raised, and this witness testified a long time ago.

THE COURT: He has requested that his recollection be refreshed on what his Grand Jury testimony was.

Isn't that right, Mr. Stewart?

THE WITNESS: No, I don't believe I said that. If he has something to disprove what I said—

MR. CHADWELL: He said if he had something, bring it out.

THE COURT: I assume from that statement that he

wanted the matter checked. Do you want the matter checked?

THE WITNESS: No, I have testified as to what I remember, and I don't know that I testified at all in front of the Grand Jury that I had seen it prior to, but certainly in the bringing it up to date, and the effect that it had on me when I saw it, June 30, there is a question that I had ever seen it before. Now, that was what I had said.

MR. HERNACKI: The Government stands on its request, Your Honor.

THE COURT: Yes. You would like to refresh his recollection as to what he did testify so.

MR. CHADWELL: As to that part of it, Your Honor, I suggest, as I have before, this witness testified—Mr. Stewart testified, I think, on three different occasions before the Grand Jury. No doubt this subject was covered many times. I don't know. I wasn't there. But I suggest that if he did testify on this subject before the Grand Jury, we be permitted to see everything that he said, not just some excerpt that counsel chooses to bring out, and so move and request.

THE COURT: Mr. Hernacki, I will permit you to see whether or not the answers volunteered by this witness on Page 1576 and 1577—

MR. HERNACKI: Your Honor, I am sorry, I think I gave the wrong page. I think it is 1596.

THE COURT: Did I say 76?

MR. HERNACKI: Yes, sir.

THE COURT: I was actually looking at 76 in connection with another note. 1596 is your Point 2 on your memoranda.

MR. HERNACKI: Yes, Your Honor.

THE COURT: I would permit you to read the second question and answer.

MR. CHADWELL: Your Honor, we have moved the Court for permission to see that and also all references

to this subject matter, if there are any otherwise in this Grand Jury transcript.

THE COURT: Yes, and this is my consistent ruling throughout the case. The motion will be denied.

MR. HERNACKI: Before proceeding with that, Your Honor, may I inquire of the witness another question?

THE COURT: Yes, and I think there may be—

MR. HERNACKI: Perhaps this might be a good time for an adjournment, Your Honor—

THE COURT: I think it would, because actually I looked at your Point 2, and you said Point 2 is right, and I think it is under your Point 3, actually.

MR. HERNACKI: Maybe we better regroup.

(R. 6360-6374)

Q. Mr. Stewart, I am going to read to you a short passage from your Grand Jury testimony and then I will ask you something about it. I will read the question and answer, and this is in regard to the meeting we have been discussing on June 13th, 1958.

THE COURT: What page are you on?

MR. HERNACKI: This is Page 1596 of the transcript, Your Honor.

THE COURT: Thank you.

Q. (By Mr. Hernacki) You will recall the earlier testimony here, sir, to the effect that in the Grand Jury proceedings it was believed the meeting was on June 11th and you discovered later it was the 13th?

A. I don't remember that.

Q. Well, do you recall you were testifying in the Grand Jury about June 11th as a date, whereas actually we have evidence here it was the 13th?

A. Yes.

Q. "QUESTION: Had you attended a meeting with Mr. Augenstein on June 11th in Kansas? ANSWER: There was —I can't say whether it was June 11, but prior—I think

it was after I had received a copy of this ten percent discount from Mr. Augenstein that Ray and Frank were in town."

And again does that refresh your recollection as to what you said before the Grand Jury, sir?

A. No, it doesn't.

Q. Does it help you in any way to pinpoint when you first received a draft of some sort of a discount from Borden, from Mr. Augenstein?

A. No, it does not. I know if I had received it, I didn't keep it and we certainly didn't consider it seriously, because I made no projections on it or as to how it affected our customers, how it fit into our customers, because I did that on June the 30th when they came out with their price increase notice of July the 1st.

Q. Well, didn't you discuss the Borden proposal at the meeting at the President Hotel?

A. No.

MR. HERNACKI: In that connection, Your Honor, the Government desires to read a passage from Page 1597 of the transcript.

THE COURT: For the purpose of refreshment?

MR. HERNACKI: Yes, Your Honor.

Q. (By Mr. Hernacki) Again, sir, I will read a portion and ask you about it.

MR. CHADWELL: Your Honor, I assume that we have a standing motion for—in fairness for the right to examine this and all related passages before redirect of Mr. Stewart?

THE COURT: Mr. Chadwell, you have had that from the outset of the case.

MR. CHADWELL: Yes.

THE COURT: And I have indicated to you that my view of the law is that I can't do that.

MR. CHADWELL: I understand that, but I want to have the understanding that we have this standing objection not only to the previous question, but anything else he reads to the witness.

THE COURT: And at any other time that reading is made for the purpose of refreshment.

MR. CHADWELL: Thank you, Your Honor.

Q. (By Mr. Hernacki) "QUESTION: Well, what was the purpose of this meeting on June 11th"—June 13th, actually—"you attended it, what transpired? ANSWER: I think this ten percent discount was studied. Of course, there was—not studied, it was—we told them we did not like it and I think probably others told them they didn't like it, that is wasn't workable, and certainly a discussion of the gallon situation and the deplorable situation of the market, the spot subsidizing."

Does that to any degree, sir, help refresh your recollection on this point?

A. Not as to a discount plan at that meeting, no, sir.

Q. You don't recall any discussion of a Borden proposal at this meeting?

A. No, sir, I don't.

Q. You testified on direct that Mr. Edquist had complained about the long discounts, Milgram and Fleming, and stated in words to the effect that they should be eliminated?

A. I don't think he knew, I think he was just fishing a little bit—

Q. Sir, I am just asking whether you testified about that on direct?

A. Yes.

Q. And what did Mr. Pentz say about this?

* * *

A. When Mr. Edquist said that he thought some of the spots, some of the weekend specials, some of the loss leaders, were created by long discounts and he pointed, I believe, mentioned Fleming and Milgram. And Mr. Pentz said, "Those two accounts are the concern of Sealtest and Borden's," and that ended the conversation. Well, it ended Mr. Pentz' conversation. Mr. Edquist—

Q. Well, before you are proceeding, may I inquire, did

Mr. Pentz further state that since they were controlled by the two companies, they could handle them at any time?

• • •

A. I have stated what I think Mr. Edquist—or Mr. Pentz said, and Mr. Edquist then added that in any market where two large accounts were off list pricing—in other words, spot pricing, subsidized, or call it what you wish—it is bad for the market, and Mr. Wise agreed a hundred percent.

Q. Well, perhaps I can try to refresh you, sir, on Mr. Pentz.

MR. HERNACKI: At this time, Your Honor, I request the opportunity of seeking to refresh by reading from the transcript at Page 1769 and 1770.

MR. CHADWELL: May I inquire, Your Honor please, as to what he's said he is refreshing the witness on?

MR. HERNACKI: With regard to what Mr. Pentz said on this subject.

MR. CHADWELL: In response to Mr. Edquist's observation?

MR. HERNACKI: Correct.

THE WITNESS: This is my conversation?

MR. HERNACKI: Yes, sir. Do I have the Court's permission?

THE COURT: Yes, you may.

Q. (By Mr. Hernacki) "QUESTION: Who made that statement? ANSWER: Well, it was just conversation, I don't know who made it. I remember at that time that Jack Pentz—there were two large customers in this town in Kansas City, one of which was the Milgram Company, that the Borden Company and ourselves were serving, that it was necessary to go to thirteen percent because of the competitive offer by Hawthorn-Mellody, and the other one was the Fleming Company on the regular discount plus their central billing, that I think Jack Pentz of the Borden Company made the remark about, that certainly those two shouldn't keep the market upset because it was just between

the two companies, the Borden Company and ourselves and that should be able to be handled at any time."

And then the conversation goes on. Do you recall—does that refresh your memory as to what Mr. Pentz said on the subject?

MR. PURCELL: Now, just a moment, Your Honor, I may be wrong, but I think Mr. Hernacki's last question regarding what Mr. Pentz said had to do with the control of these two accounts by Borden and Sealtest. Furthermore, I suggest that it is perfectly improper to permit this reading from the Grand Jury minutes, because it isn't the slightest bit inconsistent with what the witness has testified.

THE COURT: I think perhaps, Mr. Hernacki, you should finish—

MR. HERNACKI: Yes, Your Honor.

THE COURT:—the rest of the answer of the witness, because it ties in and relates to the entire matter.

MR. HERNACKI: Continuing: "And that should be able to be handled at any time and Erhardt Edquist said, 'I don't think any market can be sound with any two major customers buying ice cream or buying milk for a lesser price than what the rest of the average market is buying it at,' and I remember specifically that Ray Wise said, 'I agree with that one hundred percent,' and I agreed with it a hundred percent and we have desperately tried to get these things straightened out and were not able to do it until some time in July when we cut out all spot subsidizing, which was fifty-eight percent of our wholesale business."

MR. CHADWELL: If Your Honor please, I think that the witness does not need refreshing, this is exactly consistent with what he has testified.

MR. JINKINSON: He has not testified to what Mr. Pentz said.

• • •

MR. CHADWELL: I don't think it is fair refreshment, Your Honor please.

THE COURT: Gentlemen—you may ask the witness whether or not this refreshes his recollection as to what

Mr. Pentz said simultaneously Mr. Stewart, with your testimony about the hundred percent. Does this refresh your recollection as to what Mr. Pentz said at that time?

THE WITNESS: What about the hundred percent?

MR. CHADWELL: Your Honor, may I call the Court's attention to what the witness testified yesterday on this subject, Page 6185?

THE COURT: Well, Mr. Chadwell, the purpose of this examination at the present time is to determine whether or not the testimony of this witness before the Grand Jury refreshes his recollection as to what Mr. Pentz said, and in response to a question from Mr. Hernacki, the witness could not testify, and the whole purpose of this is for that purpose and none other.

MR. CHADWELL: I understand, Your Honor. I don't want to press the point if Your Honor doesn't want to hear me any further.

THE COURT: Let me finish this, because I think you will approve highly of what I want to tell the jury. I want to advise the jury that this portion of the Grand Jury testimony occupies the same position as any other portion of Grand Jury testimony that has been read for the refreshment of the witness' recollection. If it does help the witness' recollection, as in some instances during the trial that has proved to be the case, then the witness gives firm testimony. If it does not, that is the end of that. You are not to consider the portion of the Grand Jury examination as evidence in this case.

Now, do you have anything else to add?

MR. CHADWELL: I have this objection, if Your Honor please, and as I say, I don't want to press it unduly if Your Honor has ruled, and I, of course, don't object to the statement the Court has just made to the jury, but the fact is, in his testimony yesterday, he expressly testified as to what Mr. Pentz said—

MR. JINKINSON: Where?

MR. PURCELL: He has done so today.

MR. CHADWELL: At Page 6185.

THE COURT: Mr. Chadwell, this is on cross-examination.

MR. CHADWELL: I understand.

THE COURT: And I think the fact that he did testify, places it directly within the scope of the cross-examination—

MR. CHADWELL: No doubt about that.

THE COURT: —and this is what Mr. Hernacki is attempting to do.

MR. CHADWELL: Well, I don't object to his cross-examining on it, I just object to this way of doing it.

THE COURT: You may proceed, Mr. Hernacki.

Q. (By Mr. Hernacki) Did you answer as to whether or not that refreshed your memory as to what Mr. Pentz said at this time?

A. I have testified just here as to everything that I remember Mr. Pentz saying at that meeting.

Q. Mr. Edquist was opposed to the long discounts to Milgram, Mr. Pentz made the statement you have testified to, and Mr. Wise said he agreed with that one hundred per cent?

A. That isn't exactly the way it happened.

Q. Well, will you restate it the way it happened?

A. I told you that because of the weekends, because of spot pricing—

Q. You are talking about the conversation now?

A. Yes.

Q. All right. Who said what now?

A. This is Mr. Edquist. Because of those things he felt that there was a long discount, and he didn't know what the discount was, to who, or anything other than the regular established discount, but he said that he felt that was the reason for some of these weekends, and what do you call them—well, when you sell an item low.

Q. Low pricing?

A. No, it is—

MR. JINKINSON: Loss leader.

A. It is a special, and he felt that it was caused by a long discount to these two customers that he mentioned, and that it was bad for the market or any market where you had that situation, where any two customers or one customer was off list pricing, and created these weeeknds, or the loss specials, and—

Q. (By Mr. Hernacki) Would you carry on with the rest of the conversation on this subject?

A. Well, Mr. Pentz just said that, if I remember right, that that was Sealtest and Borden's customers and that ended that, but Mr. Edquist—

Q. Did he say that ended that?

A. No, he didn't say it. I said it, that ended his conversation. He said that was the concern of Sealtest and Borden or that was their customers and their problems.

Q. What did you understand him to mean by that statement?

A. Well, I would say we served together with Borden's, the Milgram stores, and we served most of the Fleming stores, and that is when Mr. Edquist said that any market, this market or any other market where one or more customers were on a long discount and they could use it to have these weekend specials, it was bad for the market, and Mr. Wise agreed a hundred per cent.

Q. And on August 1, 1958, you and Borden did get rid of that long discount to Milgram, didn't you?

A. We did. I don't know what Borden's did.

Q. You never learned that Borden discontinued long discounts to Milgram?

A. No, sir, nothing direct. We kept our business so we figured we certainly didn't have an advantage at a particular time. We didn't lose it until later.

Q. You didn't learn from any source that Borden had also put in the same type of discount schedule you had and had discontinued its long discount to Milgram?

A. Oh, when we put in our discount schedule of 7 and 3—

Q. On August 1, 1958?

A. I had no knowledge whatsoever that they didn't have something extra to the Milgram's store. In fact we lost, at that particular time, cut down to 10 per cent of the space and lost about 80 per cent of our volume so there was a question in my mind whether it was because we weren't subsidizing spots, we cut out all of the spots, or whether it might have been something a little extra. Certainly we lost our volume and there must have been a reason for it.

(R. 6413-6417)

Q. Now, on October 30—I am sorry, on June 30, 1958, you testified you had a phone conversation with Mr. Augenstein. Do you recall, that, sir?

A. After I had picked up some Borden—well, yes. After I had picked up some Borden price lists or I hadn't picked them up, they came up to our office through our drivers and our sales organization, I did call Mr. Augenstein to ask him—

Q. Now, just a second, was he calling you as a matter of courtesy?

A. No, I had no call from Mr. Augenstein. Maybe that is the reason we eventually lost most of the Milgram business.

MR. HERNACKI: At this time, Your Honor, Government desires to read from Page 1576 of the Grand Jury transcript in an effort to refresh—

THE COURT: On what particular point, Mr. Hernacki?

MR. HERNACKI: With regard to who made the call, who initiated the call.

THE COURT: I am not sure that the witness has testified definitely whether he has a recollection on that. I think you should make further inquiry as to whether he called Mr. Augenstein or Mr. Augenstein called him. I

am not clear from the testimony exactly what the witness' present testimony is.

Q. (By Mr. Hernacki) What is your testimony on that point, sir?

A. I believe I testified yesterday that I called Mr. Augenstein. I might add I found out, whether I called him or he called me.

Q. We will get into the conversation in a minute.

MR. HERNACKI: In view of that—

THE COURT: I didn't get this last.

THE WITNESS: I said I found out that the discount did not apply to the Milgram Stores, whether I called him or he called me. I know it was a telephone conversation that I found out about it.

Q. (By Mr. Hernacki) Now, is your testimony now that you are not sure of who called whom?

A. Well, you've put a little question in my mind. There was no question before, I don't believe.

Q. That is the first time I have been able to do that.

A. You have tried.

Q. Well, is it now your testimony that you are uncertain as to who initiated the call?

A. I will stick to my testimony of yesterday that I believe, to the best of my ability to remember, that I called Mr. Augenstein, but it could have been the reverse.

MR. HERNACKI: In view of that, Your Honor, I request the right to read from Page 1576 and 7.

THE COURT: You may do so for refreshment purposes.

The defense objection shall stand of record.

Q. (By Mr. Hernacki) (Reading:)

"Q. What was the conversation, what did you say, what did Mr. Wise say, what did Mr. Gardner say?

"A. I don't know whether I can pinpoint that or not. I do remember this, that I received a call from Art Augenstein and I think this was on the 30th—

"Q. (Interrupting) You didn't receive it before then?

"A. No, sir, it was telling us that the price increase—telling us that the discount schedule did not apply to all his customers. There was one customer that it did not apply to. That was the customer that was mutually served by both of us, and certainly that was another reason why we couldn't go along with the setup that they had or why we didn't agree with it, why it would be wrong. It was not only wrong for the small dealer but we didn't have time to devise something that would be right. The spot pricing was still over the area and the gallon jugs were still off price."

Does that, to any extent, sir, refresh you as to who initiated the call in the first instance?

A. I can't even tell from what you read who made the call, whether it was Mr. Augenstein or myself.

Q. Would it help if I read it again?

A. It might.

Q. The first part relating to the call?

A. Yes.

Q. (Reading:)

"Q. What did Mr. Wise say, what did Mr. Gardner say?

"A. I don't know whether I can pinpoint that or not. I do remember this, that I received a call from Art Augenstein and I think this was on the 30th—

"Q. (Interrupting) You didn't receive it before then?

"A. No, sir, it was telling us the price increase—telling us the discount schedule did not apply to all of his customers."

A. It could have been him or it could have been me. I testified there that I thought it was Mr. Augenstein that called me, and I testified yesterday that I thought it was I that had called Mr. Augenstein. Anyway, I found out that it did—that discount did not apply to the Milgram Stores.

EXTRACT FROM TRIAL COURT'S JURY INSTRUCTIONS AS TO CONSIDERATION OF INTENT EVIDENCE IN MORE THAN ONE COUNT

(R.7109-15)

THE COURT: • • •

I think I will state the intention rule and the manner in which evidence may be considered as being applicable to all counts. There is the obvious problem of whether or not in the regular order in which we permitted the introduction of evidence, as to whether you are going to try to have to keep in mind evidence introduced in connection with a particular count and to try to make application of that evidence in connection with some other count.

Also involved in this general problem is the question of whether evidence adduced in connection with Counts 11, 12 and 13, the only counts in which the Defendant Wise is concerned, may be in effect supplemented by your consideration of evidence introduced in connection with the distributor counts in which he is not a party. The problem is a simple one, because there is but one single exception that I will state. To introduce this problem to you, I will further state that this question is confined—that this exception is confined to only the Sherman Act counts. In each of the Sherman Act counts, as I am sure you now understand, there is a separate conspiracy charged. The conspiracies alleged in each of the counts, Counts 1, 3, 5, 7, 9, 11, 12, and 14, are separate from any conspiracy charged in any of the other counts. You may not, except for the exception that I will state, consider the evidence under any one Sherman count as evidence in support of the charge under any other Sherman Act count of the indictment. That's your general rule. On each count of indict-

ment, the burden of proof rests upon the Government to make out and prove to the satisfaction of the jury beyond a reasonable doubt every material allegation of that particular count, and unless that has been done, you should find the defendant or defendants not guilty on that particular charge.

As to the Sherman Act Counts 11 and 12, and the Robinson-Patman Act Count 13, there are two defendants charged and placed on trial together, and you are to consider these charges as applying to each of them, and while they are being tried together, still each defendant must be proved by the Government to be guilty beyond a reasonable doubt, as I am sure I fully explained. It is not necessary to find both the corporation and the individual now on trial before you to be guilty in order to find one of them guilty of the conspiracy alleged in the particular indictment—in the particular count of the indictment. If the evidence and circumstances before you prove to your satisfaction beyond a reasonable doubt that one or the other of the defendants is guilty but does not so convince you that the remaining defendant is guilty, you may convict the one you find to be guilty and acquit the one whom you may find to be not guilty.

Similarly, you may, if so convinced by all the evidence, find one or the other of the defendants guilty under both Sherman Act Counts 11 and 12 of the indictment and the other guilty under only one of the two counts.

Now, specifically, as far as the exception that I have spoken about, when considering the guilt or innocence of one or both of the defendants under any count charged in the indictment, I instruct you that with but the single exception, you must limit your consideration to the evidence applicable only to that particular count. The one exception to that rule relates to evidence of any earlier occurrences

received in connection with one particular count that might help explain the intent of a defendant in another count under consideration. This exception is broad enough to permit you to consider a course of conduct engaged in by a particular defendant even before the period of indictment contained in the particular count under consideration. You are to understand, of course, that your consideration of such evidence may be considered by you solely as an aid for discovering intent and purpose of the particular defendant and not for any other purpose.

I will explain to you an application of this principle. With regard to the Sherman Act charges against National in Counts 1, 3, 5, 7, 9, 11, 12, and 14, which are all the Sherman Act counts, you may, when considering one of these counts as to National, consider also evidence of earlier occurrences pertaining to another Sherman Act count which you might find would bear also upon National's intent in the count under consideration. Of course, such evidence can be considered only for the purpose of intent and no other purpose. On the other hand, if you do not find any evidence of earlier occurrence in other Sherman Act counts which you consider explanatory of National's intent in the count under consideration, then you may not consider evidence relating to other counts for any purpose in determining National's guilt or innocence in the specific count that you are determining.

With regard to the Sherman Act charges in Count 12 against Defendant Wise, you may only consider evidence of earlier occurrences given in connection with Count 11, both of which relate to the Kansas City market, and only for the limited purpose that I have stated. Of course, if you do not find any such evidence, then you may not consider any evidence taken under any count other than Count 11 relating

to the Kansas City market against Defendant Wise in connection with Count 12 which also relates to the Kansas City market.

Naturally, since there is no other evidence of earlier occurrences bearing on Count 11 as to Wise, you may not consider evidence under any other count whatsoever as against Wise when determining his guilt or innocence under Count 11.

With regard to the Robinson-Patman Act charges against National — and these are the charges in Counts 2, 4, 6, 8, 10, 13, and 15 — a distinction must be made between the situation where the evidence of earlier occurrences pertaining to another count and reflecting upon intent in the count under consideration is an act or statement of National's employees or whether it is of someone else. If it is an act or a statement of a National employee, then you may consider it only for the purpose of explaining National's intent in the count under consideration. On the other hand, if it is a statement of someone else, you may not consider it against National unless you find that the statements were made by such a person or persons at the direction or request of National or where said persons made such statements knowingly on behalf of National and in furtherance of National's plan to sell milk at unreasonably low prices for the purpose of destroying competition in a particular market.

EXTRACTS FROM TRIAL COURT'S JURY INSTRUCTIONS AS TO ROBINSON-PATMAN ACT ISSUES

(R. 7118-7144)

In connection with my over-all Robinson-Patman charge, I will first state the applicable portion of the law as passed by the Congress. I will then outline the charges made against Defendant National and Defendant Wise as alleged in Count 13, then outline the charges made in Count 2 in which only National is named as a party defendant and which represents an example of all of the distributor counts.

The principle of law which I now give you in regard to Section 3 of the Robinson-Patman Act, of course, are equally applicable to the Kansas City count and the six distributor counts, although the evidence regarding each is different. But of paramount importance, you must keep in mind that Mr. Wise is not named as a party defendant in any count except Count 13.

As I make reference to allegations in the indictment, I again remind you that those allegations are merely charges and not evidence in the case. First, the law as passed by the Congress, the relevant portion of Section 3 I will repeat so that you have it fresh in mind, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to sell or contract to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

I now outline the charges in Count 13 and Count 2. The indictment as modified by the bill of particulars charges that beginning on July 14, 1958, and continuing thereafter until about August 27, 1958, National, its officers and directors, including Defendant Wise, while engaged in interstate commerce and in the course of said commerce, sold milk in the greater Kansas City market at unreasonably

low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act.

The indictment alleges that pursuant to the offense charged, National utilized the advantages it possessed by reason of the fact that it operated in a great many different geographical locations in order to finance and subsidize a price war against the small dairies selling milk in competition with it in the greater Kansas City market by intentionally selling milk to its customers at prices which were below its cost.

You will recall that earlier I mentioned that the question of economic power was an issue and it is in this connection that the exception that I mentioned when I charged you concerning the size of the Defendant National will be applicable.

Count 2 of the typical distributor count allegations charges that beginning about July 15, 1958, and continuing until about August 27, 1958—and the dates in the other distributor counts will, of course, be different and I will give you those as I reach them—that National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, in the case of Paola, Mr. Merle Martin—I will give you the other names as I reach them—in the Paola-Osawatomie market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Martin by selling milk to Martin at prices below National's cost.

The effects of the offense, it is alleged, have been to cause severe financial losses to small dairies doing business in

that market and to cause such dairies to suffer losses in sales volume.

When the Congress passed Section 3 of the Robinson-Patman Act, it condemned sales made below cost if it should be determined as a matter of fact that such sales were made, in the language of the statute, at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

By its enactment of Section 3, the Congress, in the exercise of the power vested by the Constitution, under the commerce clause, barred the use of interstate business to destroy local business through programs in which a particular company or individual would underwrite the losses of local price cutting campaigns.

The enactment of the Robinson-Patman Act was for the purpose of strengthening existing laws which were aimed at the specific economic weapon called predatory pricing.

When the Supreme Court and other courts, including this court, make use of such descriptive language as predatory pricing, we do so to describe in quick somewhat short-hand-type language but in quite accurate fashion, the business conduct that the Congress has proscribed as unlawful business conduct.

When the Congress passed Section 3 of the Robinson-Patman Act it prohibited sales at unreasonably low prices that were intentionally established for the purpose of destroying competition.

The Congress required proof of a predatory intent on the part of one charged with violation of Section 3 of the Robinson-Patman Act.

The law requires that proof of such an intent, proof of an intent to sell at unreasonably low prices in furtherance of a purpose of destroying competition, be made beyond a

reasonable doubt. Basically, Section 3 of the Robinson-Patman Act is directed at business conduct designed to destroy competition.

Now, of course, neither Section 3 of the Robinson-Patman Act nor any other law of Congress can be evaluated or applied in the abstract. It is quite clear that Section 3 is not to be applied to hold that every sale that is made below cost is to be determined to be a sale made at an unreasonably low price for the purpose of destroying competition or eliminating a competitor.

Sales made below cost which have a legitimate commercial objective and which are made without any specific intent to destroy competition would not fall within the prohibition of Section 3 of the Robinson-Patman Act.

There is little difficulty in calling to mind examples of sales that would be made below cost that would not, and could not under the law be considered as being within the prohibition of Section 3 of the Robinson-Patman Act. It is within your common knowledge that sellers are not infrequently required to make sales below cost to get rid of perishable goods that would soon be worthless unless sold immediately for whatever price the goods would bring.

Obsolescence of seasonal goods, sales of slow moving excess merchandise, and sales made in connection with a good faith liquidation of a business are other examples of sales with a legitimate commercial objective.

Pricing conduct involved in the sort of examples just stated involve sales below cost that are clearly made in furtherance of an obvious legitimate business objective, and therefore are not within the coverage of the statute.

If this case involved facts as simple as those examples, none of us would be as well acquainted as we now are.

The case on trial calls into play further legal principles

that you must apply to the facts as you find them. The point of beginning is that under Section 3 of the Robinson-Patman Act, as construed by the Supreme Court, sales below cost are not condemned if made in furtherance of a need to meet a lawful, equally low price of a competitor. If such is factually found to be the purpose of particular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law.

Broadly speaking, it is apparent that the evidence adduced in this trial by all the parties has been admitted so that you, the jury, may, under the guidance I give you concerning the applicable law, make factual determinations concerning the reasonableness of the alleged pricing conduct involved and to determine the presence or absence of the predatory intent necessary to be established beyond reasonable doubt as an element of conviction.

Several things must be said about the words that we have heard frequently here of "meeting competition."

The mere fact that a witness states that his company's pricing policy was justified by meeting competition or that the pricing policy was justified by the competitive situation, does not necessarily decide the issue, because such a statement and such testimony is simply a conclusion on the part of the witness.

This is not in any way to say that you should not give consideration to the testimony of witnesses that did testify that particular pricing conduct was for the purpose of meeting competition, because such testimony is relevant and may be considered by you in connection with your determination of the question of fact in regard to whether or not you believe, beyond a reasonable doubt, that the defendants acted with the predatory intent necessary for conviction.

As jurors, your ultimate judgment of the facts as you find them to be may or it may not agree with a particular witness' conclusion that particular pricing conduct, as you find the facts concerning that conduct to be, was or was not for the purpose of meeting a lawful, equally low price of a competitor.

The point of law that I instruct you is that it is your duty as jurors to find the facts and to reach your own conclusion as to the purpose of the pricing conduct as you find that pricing conduct to be from the testimony and evidence in this case.

Still another way, perhaps, to express something of the same thought and the same applicable legal principles is to call your attention to the language of a recent decision of the Supreme Court which states in its applicable part, that "in appraising the effects of any price cut or the corresponding response to it, courts—and the language is broad enough to include juries as an integral part of the courts in the administration of justice—must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas—and I suggest that the conclusion 'meeting competition' is such a formula and conclusion—cannot be made to substitute for adequate probative analysis."

Experience teaches us that a businessman does not deliberately and consistently sell at a loss in the usual course of his business without a special reason. It is for you to decide whether National did deliberately sell at a loss for a sustained period of time, if you find beyond a reasonable doubt that such was a fact, and, if so, whether the reason for such sale below cost was to destroy competition or to meet it.

I am sure that you understand that the law recognizes that there are two sides to the coin of the defense of meeting competition in good faith for a legitimate commercial

objective. I charge you that it is the law that if a seller offers a reduced price for no other reason than to meet the lawfully lower price of a competitor, then the seller's pricing falls within the protection of the good faith meeting competition defense.

As applied to this case, should you find from the evidence in connection with one of the distributor counts, for example, that Defendant National did in fact sell below its cost and that such sales might be unreasonably low sales, but you also found as a fact that Defendant National offered its reduced prices simply to meet the lawfully low price of a competitor, and you found in fact that a lawfully low price of a competitor was in existence when defendant reduced its price, then your verdict would be for Defendant National on that particular distributor count.

Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self defense against a price raise by a competitor.

I think both sides of the coin are made quite distinct by the quotation of the Supreme Court in two separate Congressional reports. The first case quoted a report of the Senate, which pointed out that liberty to meet competition could, under particular factual circumstances, become in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency.

The second case quoted a report of the House of Representatives, and in that connection, the House and the Senate stand on equal ground for the purpose in which I am calling attention to both sides of the coin. The House report stated that in any competitive economy, we can't avoid injury to some of the competitors. The law does not,

and under the free enterprise it cannot, guarantee businessmen against loss. That businessmen may lose money or even go bankrupt does not necessarily mean that competition has been injured.

The law holds that the mere recognition that harm sometimes may be a by-product of competition is the beginning and not the end of the probative analysis that must be made of the facts in this case. As the jury, you must seek out the facts in each particular count and make your determination.

I think I can next best introduce the next legal principle that you are to apply by reminding you of the testimony of one of the witnesses that the purpose of the pricing practice in a particular distributor area was, as he put it in his conclusory language, quote, to meet competition, not to kill it, end quote. You have heard a great deal of testimony in this case about two half gallons of paper versus glass gallon jugs, about spreads, differentials, and about meeting prices head-on, and about prices being on or off the nose. You have even successfully handled both paper and glass types of container up to and including the glass gallon jugs with the container full of milk, and I might parenthetically add, because the milk will not be in the record, that you handled all the milk filled containers, paper and glass alike, in an exemplary fashion that provided no occasion for the Court to have to suggest what should not be cried about.

All of the evidence admitted was admitted in order that the jury have evidence upon which it could make a finding of fact of whether or not under the evidence and under all the other evidence in this case, it can be said as defendants urge, that milk is merely milk and the type of container, paper or glass, has no real significance in fact. You must determine that fact and you must determine the companion question of fact as to whether or not pricing conduct that proceeds upon the theory that milk is milk, if you should

find that to be a fact, is a pricing policy designed to meet competition or whether it is a pricing policy designed to undercut the price of a particular competitor.

The law has long recognized as both experience and logic teach, that price differentials do in fact exist in connection with particular commodities on the market. It is within your own experience to have known motorists, and perhaps you may be one of them, to drive by several cutrate filling stations, even when he is almost out of gasoline, in order to get the privilege of paying a cent of two or perhaps more per gallon of gas in order that his gasoline tank be filled with gasoline that has a familiar name and is sold by one of the major oil companies that he has patronized for years without ever quite knowing why he started buying Standard or Phillips 66 or Shell or whatever brand it may be.

Such a motorist may expect more when he pays more for his favorite brand, but whether he gets more depends upon whether or not the cutrate station that he passed was or was not in fact selling gasoline that came from the same tank car as that purchased by the motorist who went to his major brand station as is sometimes the case.

The point is, that the motoring public is willing and does in fact pay more for particularly well known brands of gasoline than it will pay for unknown brands of gasoline. A known differential is one of the facts of economic life in the gasoline business.

I mention the gasoline business in this case only to illustrate that one of the factual issues that you must decide in this case involving the milk business relates to the question of whether or not National did in fact meet competition or whether or not its pricing practices, as you may find them to be, in fact undercut prices when it priced its twin packs or two of its half gallon paper at the same price as the various gallon jugs or at prices so close to the glass gallon jug

as to be considered below what the Govern- contends was an existing differential under normal marketing conditions.

If you find from the evidence that National simply approached or met and did not undercut the lawful lower prices established by competition, then I instruct you that it is entitled to a verdict of acquittal under that particular Robinson-Patman count. On the other hand, if you find beyond a reasonable doubt that National sold below cost and that such prices were unreasonably low for the purpose of destroying competition and make a finding of predatory intent beyond a reasonable doubt and find that the sale below cost was unreasonably low beyond a reasonable doubt, then you must return a verdict of guilty as to National under that particular count.

Related to the factual determination that you must make in regard to differential, there are additional questions of fact that you must determine in regard to whether or not National did or did not utilize the financial advantages that you may find it possessed in order to finance the price wars charged and alleged in the various Robinson-Patman counts. You must, of course, find beyond reasonable doubt that such price wars did in fact occur and you will direct your attention to the question of fact of whether National utilized its financial power, if you find beyond reasonable doubt that it had such power, to finance such price wars.

You must, of course, determine beyond reasonable doubt the question of whether or not each of the offenses alleged in the various Robinson-Patman counts had the effects alleged on the very small dairies doing business in the various marketing areas.

In connection with the questions under discussion, you must determine beyond reasonable doubt whether or not

Defendant National did in fact have assets from other sources and whether or not those assets were in fact used to underwrite the losses of local price cutting campaigns, if, of course, you find beyond reasonable doubt that National did in fact engage in local price cutting campaigns.

I charge you that under the law the type of price cutting alleged in the Robinson-Patman counts of the indictment, were legally foreign to any legitimate commercial competition, even prior to enactment of Robinson-Patman Act. I charge you that the Congress included that in its ban on the alleged type of pricing conduct alleged in the complaint, the type of conduct, that type of conduct when it did enact the Robinson-Patman Act.

The Supreme Court pointed out in a quite recent case that so long as the price cutter does not receive a price break from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. But such a presumption cannot be relied upon by a particular defendant if contrary facts are determined beyond a reasonable doubt. For to do so, would, to again borrow the Supreme Court's language, permit a competitor supplier—in this case the Defendant National—to bring his often superior economic power to bear and thus convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier, a contest which could hardly be called an exercise in reasonable and fair competition.

I do not, of course, by my statement to you concerning the law applicable to Section 3 of the Robinson-Patman Act intimate any judgment about whether or not the Government as established beyond reasonable doubt all of the many facts that the jury must find before either defendant is to be convicted in this case.

I emphasize again that there are two sides to the legal

coin and that you are to keep both sides in mind in your consideration and determination of the factual issues involved.

It should be clear to you, for example, that should you determine that the Government failed to prove beyond reasonable doubt any one of the elements of the offenses alleged in Robinson-Patman counts, in a particular distributor area or in Kansas City, that you must return a verdict of acquittal in such a situation. It is also clear to you, I am sure, that both defendants must be acquitted if you find that the pricing conduct of Defendant National, as you find it to be from all of the evidence applicable to a particular Robinson-Patman count, was in furtherance of a legitimate commercial objective—for example, that its conduct was in fact in response to a need to meet a lawful, equally low price of a competitor. In that event, even though its sales were in fact made below cost, they would not be unreasonably low in violation of the statute for the reason that you will have determined on the facts that such sales were made without any predatory intent to destroy competition or to eliminate a competitor.

It is your ultimate duty to determine, beyond a reasonable doubt, whether the prices at which sales were made were or were not unreasonably low. Of course, we are dealing with a law that establishes a standard of conduct for all persons in the United States that are subject to that law. That standard of conduct is that prices shall not be unreasonably low under the circumstances and with the intent stated in the statute. The standards of conduct, I instruct you, are the standards of a reasonable man. And they are external in application. The standards are not only external, but they are of general application to everyone.

Those general statutes do not require that every man should get as near as he can to the best conduct possible for him, but they do require that all men under the law

at their peril fail to come up to the height determined by a jury, acting in accordance with law, to be reasonable or unreasonable and for all men in the community.

Mr. Justice Holmes, in 1881, before he was a judge, put the case of the workman on the housetop. He suggested that if at midday such a workman "knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or in other words, is chargeable with knowledge of that fact also, whether he draws that inference or not.

"If he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not.

"If a death is caused by the act, he is guilty of murder. But if the workman has reasonable cause to believe that the space below is a private yard from which everyone is excluded, and which is used as a rubbish-heap, his act is not blameworthy, and the homicide is a mere misadventure."*

You will understand that juries have been determining fact questions concerning what is reasonable and what is unreasonable for quite a long time, because Mr. Justice Holmes took his example from one given by Blackstone

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* In his instructions on the Sherman Act, the trial judge charged that if defendants "intended to engage in the agreement charged, and you find this fact beyond a reasonable doubt, it is no defense to contend that they did not intend by their agreement to affect prices because the law presumes that persons must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary" (R. 7101-02).

no put the case of the man on a roof top over a hundred years before Holmes put it again in 1881.

I this connection, the Government urges that the sales were unreasonably low because they were below National's total costs, calculated on an average unit basis for that product, usually a half gallon of homogenized milk in a paper container, which the evidence shows is an item generally employed in the trade for measuring prices and costs.

Defendants dispute this and contend that their costs must be limited to the cost of raw milk plus the cost of paper containers. It is for you to decide whether or not the prices National charged were below cost and were unreasonably low. You may take into account the different comparisons which have been introduced which showed not only total costs, and costs of raw milk plus containers, but also the cost to the cooler and yet other comparisons, with which I am sure you are familiar.

You may also take into account whatever the evidence showed as to whether or not National's Kansas City plant suffered losses in the sales to any of the markets involved during the periods in question. Of course, the question of whether or not the low price charged is unreasonable will also depend upon the purpose behind it about which I have attempted to instruct you fully.

Because I commenced my general charge concerning Section 3 of the Robinson-Patman Act by reference to Count 13 involving the Kansas City market, and by reference to Count 2 in reference to Osawatomie, I shall close this portion of my charge with a specific reference to both those counts.

(R. 7145-47)

Now, in specific regard to Count 13, involving the Kansas City market and involving both Defendant National and Defendant Wise, I instruct you that if you find beyond a reasonable doubt that the defendant National sold milk

below its cost, and that such prices were unreasonably low, for the purpose of destroying competition in the greater Kansas City market, then you must return a verdict of guilty as to National under Count 13 of this indictment.

On the other hand, if, after considering all the evidence, you are not convinced beyond a reasonable doubt that defendant National sold at unreasonably low prices or that it set prices with the purpose of eliminating competition in the greater Kansas City market, then you must return a verdict of acquittal as to National under Count 13.

I instruct you that before you can find Defendant Wise guilty under Count 13, the Robinson-Patman charge, you must first find beyond a reasonable doubt the Defendant National guilty as charged in Count 13, and in addition thereto, that Defendant Wise either aided, abetted, counselled, induced or procured the commission of the offense by National.

In that event, but only in that event, you may then find Wise guilty as charged in Count 13. Otherwise, of course, you must return a verdict of acquittal as to Defendant Wise under Count 13.

I will charge you specifically as to Count 2, because this will advise you at this point how the final paragraph of all of the Robinson-Patman distributor count charges will state the ultimate fact that you will decide.

In specific regard to Count 2 involving the Paola-Osawatomie market, and involving only the Defendant National, I instruct you that if you find from the evidence, beyond a reasonable doubt, that National did sell below its cost to Merle Martin, and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 2 of the indictment.

If, however, you are not convinced beyond a reasonable

doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 2.

I have reached the point in my charge where the next transition is to a discussion of the specific counts.

(R. 7169-7170)

In regard to the Robinson-Patman count, as alleged in Count 2, you must determine whether or not National sold milk to its distributor, Merle Martin, at unreasonably low prices for the purpose of destroying competition in that market; as to whether or not defendant National, in fact, used any economic advantage that you may find it in fact possessed, to finance any price war by selling milk to Martin below Martin's cost; and whether or not, as a matter of fact, the effect of that offense, if you so find, did in fact cause severe financial losses to the dairies that you find were doing business in that market.

(R. 7174-75)

Count 4 of the indictment charges a Robinson-Patman Act violation in the Sedalia, Missouri market. The indictment, as modified by the bill of particulars, charges that beginning about July 16, 1957, and continuing until about February 24, 1958, and from about March 13, 1958, and continuing until about August 30, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributors, such as Raymond Newton, in the Sedalia market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Newton by selling milk to New-

ton at prices below National's cost. The effects of the offense, it is alleged, have been to cause severe financial losses to small dairies doing business in that market and to cause such dairies to suffer losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Newton and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 4 of the indictment. If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 4.

(R. 7178-79)

Count 6 of the indictment charges a Robinson-Patman Act violation in the Lexington, Missouri market. The indictment, as modified by the bill of particulars, charges that beginning in about October, 1957, and continuing until about May, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, that is, Chester Heyer, in the Lexington, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged, National utilized the advantages it possessed, which I have already described, to finance a price war against small dairies selling milk in competition with it and Heyer by selling milk to Heyer at prices below National's cost. The effects of the offense, it is alleged, have been to eliminate competition in the Lexington, Missouri market and to drive small dairies from that market.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Heyer, and that such prices were unreasonably low, for the purpose of eliminat-

ing competition, then you must return a verdict of guilty as to Count 6 of the indictment.

If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 6.

(R. 7183-84)

Count 8 of the indictment charges a Robinson-Patman Act violation in the Mexico, Missouri market. The indictment, as modified by the bill of particulars, charges that begining about March 14, 1957 and continuing until about March 20, 1957, and beginning about March 22, 1957, and continuing until about January 19, 1959, National, while engaged in interstate commerce and in the course of such commerce sold milk to its distributor, that is Audrain County Dairy or Dick Isaacs, in the Mexico, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Audrain County Dairy by selling milk to Audrain County Dairy at prices below National's cost. The effects of the offense, it is alleged, have been to cause milk to be sold below cost and to cause severe financial losses to some dairies doing business in the Mexico, Missouri market and to cause such dairies to suffer losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Audrain County Dairy and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 8 of the indictment.

(R. 7189-90)

Count 10 of the indictment charges a Robinson-Patman Act violation in the Glasgow, Missouri market. The indictment, as modified by the bill of particulars, charges that from approximately July 1, 1957 and continuing until about July 31, 1957, and that beginning about February, 1958, and continuing until about May, 1958, National, while engaged in interstate commerce and in the course of such commerce, sold milk to its distributor, that is Paul Craig, in the Glasgow, Missouri market at unreasonably low prices for the purpose of destroying competition in that market in violation of Section 3 of the Robinson-Patman Act.

The indictment further alleges that pursuant to the offense charged National utilized the advantages it possessed to finance a price war against small dairies selling milk in competition with it and Paul Craig by selling milk to Paul Craig at prices below National's cost. The effects of the offense, it is charged, have been to cause severe financial losses to the small dairies doing business in the Glasgow, Missouri market and to cause such dairies to suffer substantial losses in sales volume.

If you find from the evidence beyond a reasonable doubt that National did sell below its cost to Craig and that such prices were unreasonably low for the purpose of eliminating competition, then you must return a verdict of guilty as to Count 10 of the indictment. If, however, you are not convinced beyond a reasonable doubt that National did as charged with the requisite intent, then you must return a verdict of acquittal as to Count 10.

FEB 19 1968
JOHN F. DAVIS, CLERK

No. 985

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

[redacted]
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 935

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1)[1] is reported at 384 F. 2d 457. The opinion of the district court denying petitioner's motion for a new trial (Pet. A–15), following the remand by this Court (384 U.S. 883), is reported at 262 F. Supp. 447. The prior district court opinion is reported at 231 F. Supp. 663 (Pet. A–119) and the prior decision of the court of appeals is reported at 350 F. 2d 321 (Pet. A–83).

JURISDICTION

The judgment of the the court of appeals (Pet. A–1) was entered on October 27, 1967. A timely

[1] "Pet." refers to the petition, and "Pet. A" refers to the appendix thereto.

petition for rehearing was denied on November 21, 1967 (Pet. A–14). The petition for a writ of certiorari was filed December 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court's failure to order disclosure to petitioner of grand jury testimony used to refresh the recollection of witnesses testifying primarily on certain counts did not prejudicially affect petitioner's conviction on other counts not related to the subject matter of the testimony.

2. Whether petitioner waived any right to inspect grand jury testimony of other witnesses by failing to make timely demand for such disclosure.

3. Whether the district court correctly instructed the jury concerning the application of Section 3 of the Robinson-Patman Act to sales below cost made for the purpose of destroying competition.

STATUTES AND RULE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, Section 3, of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, and Rule 6(e) of the Federal Rules of Criminal Procedure are set forth in the appendix to the petition.

STATEMENT

On September 16, 1959 a federal grand jury indicted petitioner, National Dairy Products Corporation ("National") on fifteen counts and a vice president of National, Raymond J. Wise, on three counts,

for violations of Section 1 of the Sherman and Section 3 of the Robinson-Patman Acts.[2] The trial which commenced June 13, 1963, lasted more than two months; ninety-seven witnesses testified and more than 600 exhibits were introduced. The jury found National guilty on thirteen of the fifteen counts and Wise guilty on all three counts. National and Wise were fined and Wise received suspended jail sentences. The district court denied motions for a new trial (Pet. A–119), and the court of appeals affirmed the conviction of National on all counts (Wise having dismissed his appeal). 350 F. 2d 321 (Pet. A–83). In *National Dairy Products Corporation* v. *United States*, 384 U.S. 883 (Pet. A–81), this Court vacated the Eighth Circuit's judgment and remanded to the district court for further consideration in the light of *Dennis* v. *United States*, 384 U.S. 855.

Upon remand, the trial court denied petitioner's motion for a new trial, 262 F. Supp. 447 (Pet. A–15). The court of appeals ordered a new trial as to three

[2] The district court initially dismissed the indictment against Wise on the ground that a corporate officer charged with violating the Sherman Act in a representative capacity may be prosecuted only under Section 14 of the Clayton Act, but not under the Sherman Act. On direct appeal by the United States, this Court reversed. *United States* v. *Wise*, 370 U.S. 405. The district court also dismissed the Robinson-Patman Act counts, on the ground that Section 3 of that Act, which makes it a crime to sell "at unreasonably low prices for the purpose of destroying competition * * *," was unconstitutionally vague. This Court reversed, holding that the statute was not unconstitutionally vague as applied to the indictment in this case, which charged that the unreasonably low prices were below cost. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29.

counts but affirmed the conviction on the other ten counts. 384 F. 2d 457 (Pet. A–1).

1. THE EVIDENCE

National is a large nationwide producer of dairy products. It operates a dairy plant in Kansas City, Missouri, which produces, among other products, milk sold in paper cartons. From Kansas City it distributes such milk for sale in the greater Kansas City area and in rural communities in Missouri and Kansas. The Sherman Act and Robinson-Patman Act violations, of which petitioner was convicted, were committed in the greater Kansas City area and in 5 rural markets. There was a Sherman Act and a Robinson-Patman Act charge covering each rural market; and two Sherman Act charges (involving different periods; counts 11 and 12) and one Robinson-Patman charge (count 13) covering the greater Kansas City market. The evidence showed that National conspired with its competitors in the Kansas City market, and with its independent distributors who resold its milk in the rural markets, to fix prices, and that it sold milk below cost for the purpose of driving other dairies out of business or compelling them to follow National's pricing policies. The primary targets of National's actions were small dairymen who sold low-priced milk in glass gallon jugs.

National conceded that during the relevant period it sold milk in the five rural markets below its own cost. (Petition for certiorari, No. 758, Oct. Term 1965, p. 7). National obtained from its independent distributors in those markets an agreement to follow

resale prices set by National in return for a guarantee that they would have a stated gross profit margin no matter how low the prices might be set (Tr. 2913, 2918–2921, 3325–3332, 3872–3875, 3938, 4058–4060, 4093–4094, 4207, 4215–4217). Typically, National's price reductions followed threats to its local competitors that such reductions would occur unless gallon jug prices were raised (Tr. 3338, 3396, 3988–3989, 4057–4062, 3071, 4227, 4229–4232). The purpose of the reductions was to eliminate the competition of the gallon jug operators (Tr. 3042, 3046, 4400–4404, 4138–4139, 4121–4123, 4091–4092, 3073, 4254–4256, 4342, 4311). By lowering these resale prices, National could control the price spread between paper half-gallons of its Sealtest brand and cartons or glass gallon jugs sold by local competitors. And by keeping its local prices at a low level for a period, even though it operated at a temporary loss in those markets, National was able to attract most of its competitors' customers. The small operators with which it competed could not withstand such pressures. Several small family dairies and jug dealers were forced out of business (Tr. 4179–4181, 3103, 3164, 4227–4233, 4257–4268), while others were forced either to stop handling jugs (Tr. 4057–4067) or to comply with National's directions as to the price differential which should exist between jugs and paper cartons (Tr. 3361, 3404, 3408, 3528, 4307–4312).

In the Greater Kansas City market, National conspired to fix prices during two different periods—September–October 1957 and June–October 1958. The first conspiracy involved National and three other dairies—Borden Company, Fairmont Foods Company,

and Foremost Dairies, Inc. The targets of the conspiracy were the glass jug operators and Hawthorn Mellody Dairy, which had been offering milk to Milgrim Food Stores at a 13 percent discount. (Tr. 341, 6131).

The conspiracy was carried out through a series of phone calls and meetings in Kansas City and in National's Chicago office (*e.g.,* Tr. 1009–1016, 418–419, 457–462; 6300, 1618, 674; 1620, 1623; 688–670; 242–245; 1623–1627, GX 167–A), as a result of which the price for a half-gallon of milk in cartons sold by the conspiring dairies moved in less than a month from 37 cents down to 33 cents, then up to 41 cents and back down to 39 cents (GX 101, 104, 104A; Tr. 1804). During this price maneuvering, the gallon jug operators were warned that the spread between jug and carton would have to be narrowed to no more than a 5 cent differential (Tr. 707, 2365–2367, 668–672, 1044–1046, 1669–1670, 2364–2365).

By the spring of 1958, the Kansas City milk market was again highly competitive. National proposed a plan under which prices would be lowered until the competition was weakened, and then raised. Between June and October 1958, there was an elaborate series of meetings, phone conversations and communications involving National, Borden, Fairmont, Foremost and occasionally Hawthorn Mellody. (*E.g.,* Tr. 922–923; 273, 278–280, 925–926; 928–930; 1070–1072; 541, 6413, 6417; 938–939, 874–875, 1266; 1614–1616; 295–296, 1278; 1645–1646, 880, 2470–2471, 1553; 6434–6435, 879;

654, 882, 6435–6436; 883–884, 948–951, 1104–1105, 1777–1780; 949–951, 1104–1109.) National's object was to obtain a "sound" market, which it defined as one from which gallon jugs, spot pricing, two-for-one sales, and the Milgrim discount had been eliminated (Tr. 270–278).

On July 14, 1958, all major dairies but one (which was not a member of the conspiracy) reduced milk prices (GX 103) and a week later they dropped by-product prices (Tr. 6434–6435, GX 108). On August 1, Borden, Fairmont, Foremost and Hawthorn Mellody adopted a discount schedule proposed by National which eliminated the Milgrim stores discount (GX 109). These price cuts forced the jug operators to follow the dairies' instructions concerning the price at which milk should be sold (Tr. 2098–2100, 2244, 2252–2253, 2369). On August 27, 1958, the dairies simultaneously raised their prices; they did so again in October (GX 103, 108).

2. THE GRAND JURY TRANSCRIPT

During trial the government requested leave of the court to refresh the recollection of certain witnesses about matters relating to the Kansas City conspiracy (counts 11, 12 and 13) by reading to them portions of their grand jury testimony. Petitioner moved for disclosure of the portions of the grand jury transcript which the government proposed to use and also the

related portions (Tr. 447; Pet. A–168, A–193–194, A–211–212, A–218). The motion was denied. Thereafter, under close supervision by the court, the transcript was used in attempts to refresh the recollection of seven witnesses, all of them officers or employees of the dairy companies involved (Pet. A–156–157).[3] The court repeatedly instructed the jury that only the witness' present recollection was to be considered as evidence (*e.g.*, Tr. 449–452; 1278–1279; 6368–6369).

On appeal from its conviction, petitioner raised a broad range of issues, including the contention that the district court had abused its discretion in denying the defendants' motion to inspect the portions of the grand jury transcript used in attempts to refresh the recollection of the seven witnesses (Pet. A–99 to A–104). The court of appeals rejected this argument (Pet. A–99 to A–104) and affirmed the conviction. Petitioner then sought certiorari and this Court granted the petition, vacated the judgment of the court of appeals and remanded the case to the district court "for further consideration in the light of *Dennis* v. *United States*," 384 U.S. 855, which was decided the same day as the order in this case was entered.

Following remand, petitioner moved in the district court for a new trial, renewing its argument that the court erred in denying its motion to inspect the grand

[3] See Tr. 453–456; 475–476; 498–503; 505–508; 515–521; 534–538; 637–640; 641–644; 825–829; 1006–1008; 1012–1014; 1018–1021; 1033–1035; 1073–1078; 1082–1083; 1097–1100; 1238–1240; 1248–1252; 1276–1279; 5523–5524; 6353–6363; 6365–6371; 6415–6417.

jury testimony used in the attempts to refresh the witnesses' recollections (Pet. A–16), and urging for the first time that it had a right to inspect testimony of other witnesses, some thirty in number, despite the fact that it had never sought such inspection during the trial. (Pet. A–16–17). After extensive briefing and argument, the district court denied petitioner's motion and once more entered judgments of conviction on all 13 counts. (Pet. A–65, 70).

On appeal, the court of appeals set aside petitioner's conviction on the three counts to which the testimony of the witnesses, whose memory the government attempted to refresh, primarily related, but affirmed the judgment as to the other counts (Pet. A–2).

The court also rejected petitioner's claim that it was entitled to a new trial for failure to receive access to grand jury testimony of other witnesses, because petitioner had not made a timely motion at the trial to preserve its claim of error (Pet. A–11) and had failed to demonstrate plain error affecting its substantial rights (Pet. A–12).

ARGUMENT

1. The court of appeals properly held that the failure to order disclosure of grand jury transcripts of the witnesses, whose testimony related almost exclusively to counts 11, 12 and 13,[4] did not require

[4] Only one of the witnesses whose grand jury testimony was used in an attempt to refresh his recollection, Baird, testified about both the rural areas and Kansas City. On cross-examination, government counsel attempted to refresh his recollection by reading a portion of his grand jury testimony, but was unable to do so (Tr. 5523–5524).

Petitioner erroneously contends that defense witness Stewart

reversal of petitioner's conviction under counts 1 through 10. The court held that the prosecution's use of grand jury testimony during trial in and of itself established particularized need for inspection by the defense; it thus adopted a rule wholly consistent with *Dennis* v. *United States,* which will apply prospectively in all prosecutions in the Eighth Circuit. The court also recognized that *Dennis* stands for the proposition that particularized need may exist even when the transcript is not used at trial (Pet. A–6) but concluded that whether particularized need has been shown in such circumstances depends on the facts of each case. Thus this case raises no issue concerning interpretation of this Court's *Dennis* decision. Moreover, since the district court's denial of the request for the grand jury minutes occurred prior to this Court's decision in *Dennis,* there is little reason to expect that the question presented here will have substantial impact on future cases.

Petitioner argues that because intent to eliminate competition was an element in all counts, and because the court instructed the jury that it might consider evidence pertaining to another Sherman Act count if

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testified as to the rural markets (where other witnesses testified to dealings with him). (Pet., pp. 8, 18.) Petitioner's counsel limited his questioning of Stewart to the Greater Kansas City counts and cross-examination was similarly so limited (Tr. 6076–6442). When outlining the evidence to the jury, the trial court stated that the lack of testimony by Stewart with respect to a rural count did not preclude the jury from considering testimony of other witnesses concerning conversations with Stewart (Tr. 7186). The efforts to refresh Stewart's recollection were concerned with the Kansas City counts; such efforts failed (Pet. A–266—A–279).

it found that such evidence bore on intent in the count under consideration (Pet. A–17–18), the error of nondisclosure necessarily affected the distributor counts. The record does not support this argument. The fact is that none of the instances where a witness' recollection was successfully refreshed involved testimony concerning National's intent to eliminate competition.[5] Thus, the instances where a witness' recollection was refreshed could not have had a "substantial impact" (Pet. 18) on the intent issue with respect to counts 1 through 10.[6] Indeed, as the court of appeals pointed out (Pet. A–9, n. 5), in its post-trial motions in which it challenged the failure to make the transcript available, National did not contend that such failure affected the latter counts.

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[5] Tr. 638–640; Tr. 825–829; 1006–1008; 1019–1021; 1033–1035; 1082–1083; 1099–1100; 1238–1240; 1275–1276. See pages 12–13, *infra*.

The only instance possibly touching upon intent was the testimony of Borden's plant manager, Augenstein, who in relating a conversation with Howard Adams of Adams Dairy, testified that he "speculated" as to the reasons for the price drop in Greater Kansas City on September 13, 1957 (Tr. 1032). After reading of the grand jury transcript, Augenstein recalled mentioning as one of the reasons the fact that National had been taking pictures of low-priced gallon jugs (Tr. 1035, Pet. A–233). This testimony was never brought to the jury's attention with respect to any distributor count.

[6] Contrary to petitioner's inference that the government argued before the jury that its theory of guilt in the distributor counts was the same in the Greater Kansas City counts (Pet., p. 17), government counsel made no such suggestion in closing argument. Nor did they suggest that any evidence of the seven witnesses upon whom refreshment was attempted be considered in deciding National's guilt under the distributor counts (Tr. 6773–6904, 7037–7056). There is no such suggestion in the

Moreover, even as it relates to the Kansas City events, the evidence that was adduced by refreshing the witnesses' recollections was so insignificant that it could not have prejudiced petitioner's conviction on the counts relating to the rural areas. As the court below observed:

> The record discloses that resort to the grand jury transcript produced only a minutia of substantial evidence. In most instances the witness either testified that he was not refreshed or attested to the veracity of his testimony before the grand jury. The record reveals, moreover, that such testimony was merely cumulative and that there was an abundance of other evidence, both verbal and documentary, to support the convictions under counts one through ten [Pet. A–10].

In only twenty-four instances was an attempt made to use the grand jury transcript to refresh a witness' recollection, and all were confined to the Greater Kansas City counts. In only three instances was the witness' recollection refreshed (Tr. 1019, 1034–35, 1083, Pet. A–228, A–233, A–243–244). In six other instances, the witness testified in substance that his recollection was not refreshed but "if that is what I told the grand jury, it must be true" (Tr. 638–39, 825–29, 1006–07, 1099–1100, 1238–39, 1276–77, Pet. A–198–

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court's outline of the evidence to the jury, which supplemented the closing arguments' (Tr. 7155–7196). The theory of each count and its related evidence were argued separately by counsel. In fact, at the opening of government counsel's argument, he urged the jury not to consider the entire indictment as a whole but to view as an entity "each conspiracy" charged (Tr. 6781).

199, A–213–214, A–220, A–247, A–253, A–261). Under the court's oft-repeated instructions (Tr. 450–51, 564, 1278–79, 7074–75, Pet. A–102, A–32–35), such testimony was not to be considered by the jury because the witness did not state affirmatively that his recollection was refreshed. In all other instances, the witness testified that his recollection was not refreshed and the matter was at an end.[7]

Under the facts of this case it is plain that the error of the trial court in not directing disclosure of the grand jury testimony did not affect counts 1 through 10. The court below was fully justified in invoking the harmless error rule. *Cargill* v. *United States,* 381 F. 2d 849 (C.A. 10), certiorari denied, January 15, 1968, No. 794, this Term. See *Campbell* v. *United States,* 373 U.S. 487; *Rosenberg* v. *United States,* 360 U.S. 367.[8]

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[7] Tr. 453–456; 473–476; 498–503; 505–508; 515–521; 534–537; 641–644; 1012–1013; 1073–1078; 1248–1252; 5523–5524; 6353–6361; 6363; 6364–6371; 6413–6417; Pet. A–170–171; A–174; A–178–179; A–182; A–185; A–193; A–201; A–223–224; A–239–242; A–256–257; A–264–265; A–270; A–271; A–275; A–279.

[8] Petitioner's argument that the refreshment procedure violated its Constitutional right to a fair trial, by placing before the jury non-record evidence and preventing confrontation and cross-examination, is without substance. It rests on an attempted analogy to *Robbins* v. *Small*, 371 F. 2d 793 (C.A. 1), a wholly inapposite case. In *Robbins*, the prosecutor, in the face of the plain and persistent claim by a key witness of his privilege against self-incrimination, asked him a series of fourteen leading questions, increasingly prejudicial to defendant, and drawn from the witness' extra-judicial statement, which was never placed in evidence. The court held that the prosecutor was in effect testifying and putting improper evidence before the jury, and that defendant's right of confrontation under the Sixth Amendment was thus violated. The court also observed

2. The court of appeals correctly held that petitioner's failure at the trial to seek inspection of the grand jury testimony of other government witnesses precluded it from raising the claim that the lack of such inspection required a new trial.

On remand, for the first time, petitioner sought a new trial on the ground that it had not been permitted to inspect the grand jury testimony of thirty government witnesses as to whom the government made no use of grand jury transcripts at trial (Pet. A. 16–17). Petitioner argues here (Pet. 21), as it did below (Pet. A–17), that it was entitled to inspect these transcripts because many of the witnesses were hostile and the government had the use of the testimony in preparing for trial. The court of appeals found it unnecessary to determine whether petitioner had established, under *Dennis,* a particularized need for inspection with respect to these witnesses; it properly held that petitioner had failed to preserve its claim of error for review or to establish plain error (Pet. A. 11–12).

Petitioner would excuse its failure to make a timely motion to inspect on the ground that under *United*

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that apart from this improper evidence, the evidence of defendant's guilt was not strong, and that the trial court's belated instruction was not effective to cure the prejudice.

In contrast, the district judge in the present case carefully supervised the use of the grand jury testimony to ensure that neither the witness nor petitioner was prejudiced. Government counsel recognized that if the witness' recollection was not refreshed, "that is the end of it" (Tr. 5521). The court carefully and repeatedly instructed the jury that the grand jury testimony was not evidence in the case (Tr. 449–452; 564; 829–830; 1278–1279; 6368–6369; 7074–7075). The court also monitored the tone and phrasing of counsel's questions to ensure that they raised no improper inferences (Tr. 642–643; 826–827; 1251–1252).

States v. *Procter & Gamble Co.*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, it could not have shown particularized need at the time of the trial and that it was not until *Dennis* that it had any reasonable basis for seeking to examine this material. While *Dennis* liberalized the standards for disclosure of grand jury testimony at trial, it did not obviate the need for making a timely request to inspect. The defendants in *Dennis* moved at the trial for production of the grand jury transcript or, alternatively, for its *in camera* inspection by the trial judge followed by production of any portions as to which he found inconsistencies between the witness' trial and grand jury testimony. 384 U.S. at 868. Petitioner gives no valid reason why it did not follow the same course in this case;[9] had it done so, the trial court could have exercised its discretion to determine whether petitioner had shown a particularized need for the transcript.[10]

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[9] *Dennis* itself recognized that following *Procter & Gamble* and *Pittsburgh* many defense counsel made a practice of demanding grand jury transcripts or *in camera* inspection, 384 U.S. at 874, n. 21. There is no reason to assume that the trial judge here would not have conducted an *in camera* inspection for inconsistencies upon timely motion. In *Pittsburgh*, this Court rejected a claim that the trial court erred because it did not conduct an *in camera* inspection (in the absence of other showing of particularized need) "because petitioners made no such request of the trial judge." 360 U.S. at 401.

[10] Thus, inapplicable here are cases like *O'Connor* v. *Ohio*, 385 U.S. 92, and *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, which overlook an appellant's failure to assert a claim below because of an intervening change in decisional law.

Nor do recent lower court decisions applying *Dennis* aid petitioner. See *United States* v. *Youngblood*, 379 F. 2d 365

3. The trial judge's lengthy charge to the jury (Tr. 7059–7201) discussed separately the Sherman Act (Tr. 7092–7116) and the Robinson-Patman Act (Tr. 7116–7147), and then specifically charged on each count individually (Tr. 7149–7196). Under the court's instructions on the Robinson-Patman Act counts, the jury was to decide whether National had sold below cost. Whether it found sales below direct cost, or above direct cost but below fully distributed cost, it was to assess the relevant business evidence to determine whether the sale prices were unreasonably low (Tr. 7141–7144). It was told that it could not find prices below cost to be unreasonably low if they were in furtherance of a legitimate commercial objective, such as to meet the lawful, equally low price of a competitor (Tr. 7125–7140). The jury was repeatedly instructed that it could not convict unless it also found a specific intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146).

(a) There is no basis for petitioner's contention (Pet. 24–26) that the instructions permitted conviction on the Robinson-Patman Act counts upon a finding of presumed intent inferred from selling below cost rather than a specific purpose to destroy competition. The trial court carefully and repeatedly pointed out that Congress required proof of a predatory intent and that sales "which are made without any specific intent to destroy competition would not fall within

(C.A. 2); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied, January 15, 1968, No. 794, this Term; *Worthy* v. *United States*, 383 F. 2d 524 (C.A.D.C.). Each of these cases involved a timely motion during trial (and before *Dennis*) to inspect grand jury testimony of government witnesses.

the Act" (Tr. 7122–7124). Petitioner points to no language in the Robinson-Patman instructions that permitted the jury to convict on presumed intent. Petitioner refers (Pet. 25) only to a portion of the charge instructing the jury how to determine whether sales prices are unreasonably low. The court emphasized in that instruction that the standard of reasonableness is objective and external; as an example of external standards of reasonable behavior, it gave Mr. Justice Holmes' familiar illustration of the workman who throws a beam from a scaffold in circumstances which persons of ordinary prudence would recognize as dangerous to life and limb (Tr. 7141–7144). The context clearly shows that the judge was not speaking of intent and the jury was plainly not misled.[11]

(b) Petitioner also urges (Pet. 26) this Court to review the trial judge's instructions on good faith meeting of competition. It contends that the trial court mistakenly treated this as a defense. But the jury was instructed that the government had to prove beyond a reasonable doubt the statutory elements of (1) sales "at unreasonably low prices" (2) "for the purpose of destroying competition or eliminating a competitor," and that if "meet[ing] a lawful, equally low price of a competitor * * * is factually found to be the

[11] Petitioner attempts to support its argument by appending as a footnote to its printed version of the instructions a short extract from the Sherman Act portion of the charge dealing with general intent under Section 1 of that Act (Pet. 25, A–296, n.). But the jury was informed of the different standards under the Sherman and Robinson-Patman Acts, for the court charged separately on the issue of intent under the two statutes (Tr. 7063; 7092–71776 (Sherman Act); 7116–7147 (Robinson-Patman)).

purpose of particular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law" (Pet. A–288). Compare 372 U.S. at 37.

This Court had made clear (372 U.S. at 36–37) that the burden of coming forward with evidence on meeting competition lies with the defendant. The government is not required to negative a defendant's possible justifications, for the latter is obviously best situated to develop exculpatory facts. See *Ben Hur Coal Company* v. *Wells,* 242 F. 2d 481 (C.A. 10), certiorari denied, 354 U.S. 910. Under the trial court's instructions, however, the government had the ultimate burden of proving each element of the offense, and if the jury had any question that the defendant's sales below cost were made to meet competition, it would have acquitted.

Petitioner argues (Pet. 28) that its burden on meeting competition was made more difficult because the trial court's instructions contemplated that competing prices be lawful and actually in existence. But this Court had expressly stated that sales below cost are not illegal when made in furtherance of "the need to meet a lawful, equally low price of a competitor." 372 U.S., pp. 36–37. See, also, *Federal Trade Commission* v. *Staley Co.,* 324 U.S. 746, 753–754; *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 247, n. 14. Petitioner does not contend that there was any real issue at trial as to whether the competitors' lower

prices in response to which National allegedly cut its prices actually existed.[12]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1968.

[12] Petitioner also complains that it was prejudiced with respect to "meeting competition" by two comments in the instructions. The court warned the jury that a witness' conclusory statement that prices were cut to meet competition did not of itself resolve the issue (Pet. A–288). This was not an inappropriate warning since it had to be made clear to the jury that *it* was to decide this issue. In the same portion of the charge the court also referred to the familiar differentials in gasoline prices encountered by motorists among various service stations (Pet. A–292–293). This also was not inappropriate since price differentials between paper cartons and jugs were characteristic of the pricing structure which the jury would have to consider in determining whether reductions were aimed at meeting or destroying competition. These objections relate simply to minor details of a long and difficult instruction. The comments were illustrative only, and in context were not prejudicial.

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No. 935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Dated: February 23, 1968

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

I. THE GOVERNMENT'S CONTENTION THAT THIS CASE RAISES NO ISSUE CONCERNING THE INTERPRETATION OF DENNIS

The Brief for the United States in Opposition[1] is in error in asserting (GB 10) that the present case "raises no issue concerning interpretation of this Court's *Dennis* decision."[2] The government reaches this conclusion only by ignoring the two key points which place this case at odds

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1. Hereinafter cited "GB. . . ." The Petition for a Writ of Certiorari is cited "Pet. . . ." and the Appendix thereto as "App. A. . . ."

2. Dennis v. United States, 384 U.S. 855 (1966).

with *Dennis* and decisions in the Second, Tenth and District of Columbia Circuits (see Pet. 15 n.20 and accompanying text) and create a potential impact of major proportions for future cases in the Eighth Circuit and the as yet uncommitted circuits.

These two points—the sufficiency of other evidence to support the verdict and the amount of aid received by the government from its use of the grand jury transcript—are irrelevant considerations under *Dennis* (Pet. 16-17). Yet, as to Counts 1-10, there can be no question that these factors were given controlling effect by the court below. The effect given the "sufficiency of the evidence" factor appears in the portion of the opinion quoted at GB 12. The effect given the "aid to the government" factor appears in the opinion of the Court of Appeals immediately preceding the quotation set forth on GB 12. There the court commented that the refreshment procedure did not prejudice petitioner's rights as to Counts 1-10 because of the limited effectiveness of the refreshment procedure (App. A-10).

If the district courts in the Eighth Circuit and other circuits which have not yet spoken apply the standards used by the Court of Appeals in affirming Counts 1-10, the rule in *Dennis* would be circumvented, the withholding of the transcript from the defense legitimatized, despite "particularized need," and the existing conflict among the circuits expanded.

The government is also in basic error in this case in asserting that "the court below was justified in invoking the harmless error rule" (GB 13). The trial court's error—in Counts 1-10 as well as Counts 11-13—lay not in receiving the refreshment testimony, but in foreclosing the defense from a "storehouse of relevant fact" to which the government had "exclusive access" (see *Dennis*, 384 U.S. at 873).

Accordingly, the prejudice to the defense is measured not by the impact of the refreshment testimony, but by the disadvantage which petitioner suffered from being foreclosed from additional refreshment material which might have enabled defense counsel to obtain on cross or redirect examination exculpatory or explanatory testimony to counteract or neutralize that adduced by the prosecution.

Given disclosure, no one can say what different or additional testimony the defense might have been able to adduce, or what impact such testimony might have had upon the jury as to all the market areas. Therefore, whether the refreshment process helped the government "in only three instances," in "six other instances" where the witnesses accepted their grand jury testimony as being true, or in all of "the only twenty-four instances" where refreshment was attempted (GB 12), is entirely beside the point. Application of the harmless error rule in such case, we submit, is directly contrary to the letter as well as the spirit of this Court's unanimous decision in *Dennis*.

II. THE GOVERNMENT'S CONTENTION THAT THE NON-DISCLOSURE ERROR TAINTED ONLY COUNTS 11-13

The government seeks to justify the action of the court below in completely divorcing Counts 1-10 from Counts 11-13 so far as the refreshment witnesses are concerned (GB 9-10). The government's argument that the refreshment witnesses testified "primarily" as to Counts 11-13 (App. A-10; GB 2, 9) is a grudging admission that the testimony "spilled over and infected all counts" (*cf.* App. A-9). The government totally points to the existence of a single overall intent, allegedly predatory and directed at small dairymen who sold low-priced milk in gallon jugs (GB 4).

This was also the government's position at the trial, and it is idle for it now to deny that its attorneys had one theory of guilt for both the distributor and the Kansas City counts, or that the evidence thereon—coalesced by the trial court's instructions on intent—was not inextricably intertwined (GB 10-11).

For example, beginning the closing arguments, chief trial counsel for the government stated (Tr. 6777-79):

> "National couldn't allow the public . . . [low milk prices]. So what did National do? In each of the markets covered by our indictment, National lowered its price below its cost to eliminate . . . [those low prices]; that is, to eliminate either the gallon jug or to whip into line the local dairy whose milk gave the consumer a way out from the price that National wanted to get from him.
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> • • •
>
> "In each of these markets, the Defendant National has engaged in these outlawed predatory acts to eliminate or control the cause of competition in that market."

An example of the close links between the Kansas City counts (11-13) and the distributor counts is found in the evidence that the price put into effect in Kansas City in July 1958 went into effect one day later in Paola, Kansas (Counts 1 and 2). The government urged in its post-trial brief:

> "the jury was entitled to consider, as bearing upon National's intent, the earlier evidence reflecting National's motive in dropping prices in Kansas City as a means of destroying competition by whipping the smaller dairies into line. . . . The fact that Sealtest brought the Kansas City price into Paola . . . confirms

the fact that its purpose was to destroy competition in Paola . . . as in Kansas City. . . ."[3]

The jury was not only "entitled to" consider the evidence as to petitioner's intent in Kansas City in deliberating upon the Paola counts, as the government asserted, but the trial court specifically authorized it to consider in *each* count earlier evidence of petitioner's intent received in other counts (see App. A-280—A-284). And since (contrary to GB 11), the refreshment procedure did involve testimony as to National's intent in setting its prices (Pet. 9-10), and since numerous other factors embrace all the counts (Pet. 7-11, 17-18), the non-disclosure error as to Kansas City Counts 11-13 directly tainted the distributor counts.[4]

III. THE GOVERNMENT'S CONTENTION THAT PETITIONER HAD "NO VALID REASON" FOR FAILING TO MOVE AT TRIAL TO INSPECT THE TRANSCRIPTS OF NON-REFRESHMENT WITNESSES

The government asserts that petitioner has given "no

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3. Government's Memorandum in Opposition to the Defendants' Motions for Judgments of Acquittal Notwithstanding the Verdicts and for a New Trial, XII Pl. 2157 at p. 2183. Counts 12 and 13 were also bracketed with Counts 1 and 2 in government counsel's argument to the jury (Tr. 6834, 6838, 6858).

4. Admitting that Sealtest Sales Manager Baird's testimony related to all counts, the government mistakenly asserts that the testimony of Sealtest General Manager Stewart was "limited" to the Kansas City counts (GB 9-10 n. 4). Stewart's testimony included the subject of Sealtest's general pricing policies—particularly in relation to gallon jugs and the reasons why Sealtest did not itself market a gallon jug—and this testimony bore importantly upon the basic intent issue in all counts (see, *e.g.*, Tr. 6174-79, 6185-86, 6268-70; see also Tr. 6292-95, 6351). In addition,

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valid reason" for not moving during trial to inspect grand jury transcripts of non-refreshment witnesses, and that "there is no reason to assume that the trial judge here would not have conducted an *in camera* inspection for inconsistencies upon timely motion" (GB 15 and n. 9). It ignores the three cases in the Eighth Circuit cited in the petition (Pet. 21 n. 29) which were decided only two or three years before the time of trial (and in one of which this Court had denied certiorari—*Berry* v. *United States,* 368 U.S. 955 (1962)). These decisions precluded a defendant from obtaining the transcripts of non-refreshment witnesses unless he was able to make an independent showing of inconsistencies.[5] Disclosure motions by defense counsel in disregard of those governing precedents not only would have been futile, in light of the trial judge's rulings as to the refreshment witnesses (he was "not at all sure that [such disclosure] might not actually be error"—App. A-167), but irritating to the court.

Here, just as in *O'Connor* v. *Ohio,* 385 U.S. 92 (1966) (Pet. 22-23), the fact that the Eighth Circuit's long-standing practice was not overturned until after the trial herein (but before judgment became final) should not, in justice and fairness, be permitted to deprive petitioner of a trial under the liberalized disclosure rule of *Dennis.* Particularly is this so because this Court remanded this case "for further consideration in light of *Dennis.*"

(continued from preceding page)
Stewart testified specifically as to Sealtest's part in a highly controversial "2 for 1 sale" conducted by Fleming Stores in both Kansas City and rural areas (see Tr. 6164-66, 6331-37; *cf.* GX 156-D; Tr. 276-77, 549-56, 1050-57, 3326-27, 5236-38).

5. The Tenth Circuit in *Dennis,* 346 F.2d 10, 17-18 (10th Cir. 1965), recognized that this bar existed in the Eighth Circuit, citing *Berry,* and the Eighth Circuit did not eliminate the inconsistency requirement until this Court had handed down its *Dennis* decision (see App. A-6, A-8).

IV. THE GOVERNMENT'S CONTENTION THAT THE TRIAL COURT PROPERLY CHARGED THE JURY AS TO THE ELEMENTS OF A ROBINSON-PATMAN OFFENSE

In contending that the trial court properly instructed the jury that it must find both "unreasonably low prices" and a "specific intent to destroy competition" (GB 16), the government ignores the prolix and confusing nature of the whole Robinson-Patman aspect of the trial court's charge and the fact that the trial court digressed into incomplete descriptions of decisions of this Court, reports of Congressional committees, and pricing in the gasoline industry (App. A-289—A-292, A-294) in the course of its discussion of unreasonableness and intent. It will not do to say that Justice Holmes' illustration of the workman on the housetop has to do with reasonableness rather than intent (GB 17). The example winds up with the statement that if the workman carelessly throws a beam into a busy street, resulting in death, "he is dealt with as he foresaw it. . . . he is guilty of murder" (App. A-296). Even a jury of laymen must be assumed to connect murder with "intent to kill," and certainly such an intent in the example must be a "presumed" rather than a "specific intent" (*cf.* App. A-296 n.). And considering the fact that the workman example followed hard upon an instruction that the jury's "ultimate duty [was] to determine . . . whether the prices . . . were or were not unreasonably low" (App. A-295), it is plain that the trial court's instructions fell below the constitutional as well as the statutory standard laid down by this Court for this case (see Pet. 24-26). Certainly, this Court should not permit these instructions to stand as a precedent in this novel area of the law.

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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